SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 381.

LEWIS M. ALEXANDER, APPELLANT,

vs.

THE UNITED STATES.

No. 382.

GEORGE A. WHITING, APPELLANT,

vs.

THE UNITED STATES.

No. 383.

WILLIAM Z. STUART, APPELLANT,

vs.

THE UNITED STATES.

No. 384.

GENERAL PAPER COMPANY, APPELLANT,

vs.

THE UNITED STATES.

No. 385.

E. T. HARMON AND GENERAL PAPER COMPANY, APPELLANTS.

vs.

THE UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

These appeals are taken from orders made by the Circuit Court for the Eastern District of Wisconsin, requiring the appellants Alexander, Whiting, Stuart, and Harmon to answer certain questions and produce certain books and papers for use as evidence upon hearings before an Examiner appointed to take testimony for use in a suit in equity pending in the Circuit Court for the District of Minnesota, Third Division. The proceedings in which the orders appealed from were made were brought in connection with but ancillary to the suit in equity above mentioned, which was brought by the United States against the General Paper Company and a large number of other corporations.

This suit was commenced by a petition or bill of complaint filed in the Circuit Court in the Minnesota District under the provisions of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." The petition or bill of complaint alleges the incorporation of the General Paper Company and the other corporations joined with it as defendants, the business of said corporations other than the General Paper Company being stated to be the manufacture of news print, manilla, fibre and other papers at mills situated in the states of Wisconsin, Michigan and Minnesota, and selling and shipping the products of said mills to dealers, owners and managers of newspapers and other consumers in these and other states, to-wit: Illinois, Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, Montana, Utah, Colorado, Kansas, Nebraska, Missouri, and other states west of the Mississippi River.

The remaining allegations of the bill of complaint are, in brief, as follows:

That prior to the month of May, 1900, when the defendant General Paper Company was organized, the other defendants, comprising substantially all of the manufacturers of paper in the territory above defined, were competing with each other in the sale and shipment of various kinds of paper in and throughout that territory;

That in or about the month of May, 1900, certain of the defendant corporations, in violation of the provisions of Sections 1 and 2 of the act of Congress above mentioned, entered into an

agreement, combination and conspiracy with each other to restrain the trade and commerce among the several states and to control, regulate and monopolize said trade and commerce and thereby, in conjunction and alliance with defendants who subsequently joined in the aforesaid agreement, combination and conspiracy, do now control, regulate and monopolize and restrain the trade and commerce not only in the manufacture of the products aforesaid, but also the distribution, sale and shipment thereof among and throughout the states aforesaid and all states west of the Mississippi River by means and in the manner following, to-wit:

That on or about the 26th day of May, 1900, the defendants last referred to caused to be organized under the laws of the state of Wisconsin a corporation styled General Paper Company with a capital stock of one hundred thousand dollars divided into one thousand shares and distributed among and owned and held by the defendants last named and those that subsequently joined in this combination and conspiracy in proportions based upon the average daily output of the mills of each defendant, and that this corporation, the General Paper Company, by its articles of incorporation, is authorized to become, as its principal business, the sales agent for any and all kinds of paper and paper products and any and all merchandise manufactured from paper or paper products by mills in the state of Wisconsin or elsewhere, and thereupon, in pursuance of a common plan and understanding, each of the aforesaid defendants entered into a contract and agreement with the General Paper Company making it the exclusive selling agent of its paper and paper products and conferring upon said General Paper Company absolute power to control and restrict the output of the mills of the respective defendants, fix the price of all papers sold throughout the states aforesaid and determine to whom and the terms and conditions upon which paper shall be sold and into what states and places it shall be shipped and what publishers and other customers each mill shall supply;

That after the formation of the General Paper Company the remaining defendants entered into and became parties to the aforesaid agreement, combination and conspiracy;

That each of the defendant companies for which the General Paper Company became in the manner aforementioned and is now the general selling agent agreed to and does pay to the General Paper Company for acting as its selling agent a certain percentage upon all sales of paper manufactured by it and that out of the amount received from this source the General Paper Company agreed to and does deduct its annual expenses for the

sale of the product and the balance is divided between the defendant companies as stockholders of the General Paper Company;

That by virtue of and through the instrumentality of the agreement, combination and conspiracy above described all competition in the manufacture, sale and distribution of the products aforesaid in the territory above mentioned has been suppressed and the price of all paper products greatly increased —that of news print paper in the territory aforesaid having been increased about fifty per cent., and that no dealers or newspapers or other consumers in said territory (with the exception of certain newspaper publishers in St. Louis and Chicago) can purchase any paper except directly or indirectly through the General Paper Company and then only upon prices and terms dictated by the latter.

The prayer of the petition is for an order adjudging and decreeing that the combination or conspiracy aforesaid is unlawful and that all acts done or to be done to carry it out are in derogation of the common rights of all the people of the United States and in violation of the act of Congress of July 2d, 1890, above referred to, and perpetually enjoining the defendants and their officers, directors, stockholders, agents and servants from doing any act in pursuance of or for the purpose of carrying out the same, and particularly that the Gneral Paper Company be enjoined from acting as sales agent and fixing the price at which the paper of the various defendant corporations shall be sold and the persons, corporations and newspapers to which it shall be sold and the states into which it shall be shipped and sold, and enjoining each and every of the other defendants from continuing the said arrangement with the Genral Paper Company and from making the General Paper Company their exclusive selling agent and from authorizing it to restrict the output, fix the price and terms of sale of the product of each of their mills and manufactories or to dictate and determine the persons, corporations or newspapers to which it shall be sold and the states into which the same shall be shipped and sold.

There is also a prayer for general relief and a prayer for writs of subpœna directed to the several defendants, but waiving an answer under oath, and for a temporary restraining order pending the final hearing of the case. (Pp. 15-20, Transcript in Nos. 381, 382, 383, 384.)

The Manufacturers' Paper Company, a corporation organized under the laws of the state of New York, with its principal place of business in the city of Chicago, in the state of Illinois,

was made a party to the suit, but upon its filing a demurrer the suit was dismissed as to it.

It is alleged in the bill of complaint that all of the defendants are corporations organized under the laws of Wisconsin except four, viz., the Itasca Paper Company, Hennepin Paper Company and Northwest Paper Company, of Minnesota, and the Petoskey Fibre Paper Company, of Michigan.

The General Paper Company and all other defendants except the Manufacturers' Paper Company and the Rhinelander Paper Company filed a joint and several answer (Pp. 22-27, Transcript Nos. 381, 382, 383, 384) in which they admit their incorporation and places of business and the nature of the business in which each defendant was engaged, that is of manufacturing and selling paper and shipping the products to dealers and owners and managers of newspapers and other consumers in the territory mentioned in the bill of complaint.

They also admit that prior to the year 1900 and prior to the organization of the General Paper Company all of the other defendants were competing with each other in the sale and shipment of news print, manilla, fiber and other papers throughout the territory mentioned in the complaint, but allege that they have ever since continued to so compete and are now competing.

They deny that they comprise substantially all of the manufacturers of paper in the territory mentioned and allege on the contrary that there are now and have been since prior to the year 1900 a number of other manufacturers of paper in said territory competing with each other and with the defendants in this suit.

The defendants deny that in or about the month of May, 1900, or at any time those of them specially mentioned in the bill of complaint entered into agreement, combination or conspiracy with each other or into any agreement, combination or conspiracy whatever with any person or corporation whatever to restrain the trade or commerce among the several states or to restrain the trade or commerce among any states whatever or within any state whatever, or to control or monopolize said trade or commerce, and deny that they or any of them have ever at any time made, formed, or entered into any such agreement, combination or conspiracy, and deny that they or any of them do now control, monopolize or restrain the trade and commerce between any states whatever or within any state either in the manufacture of news print, manilla, fiber or other paper, or in the distribution, sale or shipment thereof among or throughout the states of the Union or among or between any states what-

ever or within the limits or borders of any state whatever by any means or in any manner whatever.

They admit the incorporation of the General Paper Company under the laws of the state of Wisconsin on or about the 26th day of May, 1900, with a capital stock of one hundred thousand dollars, divided into a thousand shares, which corporation by its articles of incorporation was authorized to become as its principal business the sales agent for any and all kinds of paper and paper products, and for any and all merchandise manufactured from paper or paper products by mills of the state of Wisconsin or elsewhere.

They allege that thereafter each defendant separately entered into a contract with the General Paper Company making the latter its exclusive selling agent for a definite period of years to sell certain specified grades or descriptions of paper manufactured by it.

They deny that any defendant mill by such contract or agreement or otherwise ever conferred upon the General Paper Company the power to control or restrict the output of the defendant mill or mills so contracting, or to fix the price of all or any papers sold throughout the states aforesaid, or to determine to whom or the prices or conditions upon which the papers manufactured by such defendant mills, or by any of them, should be sold, or into what states or places it should be shipped, or what publishers or other customers each mill should supply.

They allege that under such contracts it was made the duty of the General Paper Company to use its best efforts to keep the mill or mills owned or controlled by the other party to each of such contracts supplied with orders for paper at the best prices reasonably obtainable, and to submit all orders so obtained to the mill for which the same were taken for its approval or rejection, and to transmit all orders received by or offered to it for a particular mill to the mill selected by the customer for approval or rejection by such mill, to the end that each of such mills might be supplied with orders to the full extent of its capacity and the demands of the trade supplied in the most prompt and efficient manner possible.

They admit that each of the defendants for which the General Paper Company acts as sales agent has agreed to and does pay to the General Paper Company for acting as such agent a certain percentage upon all sales of paper manufactured by it, which percentage is fixed by the terms of the contract between the General Paper Company and each defendant.

They admit that the profits of the business of the General

Paper Company, after payment of its expenses, are divided between the stockholders of the General Paper Company in proportion to their holdings.

They deny each and every matter, thing, allegation and charge in the complaint contained not admitted as above, and further deny all and all manner of unlawful combination and confederacy.

The separate answer of the Rhinelander Paper Company (pp. 28-34, transcript in Nos. 381, 382, 383, 384) while somewhat longer than that put in by the other defendants, contains substantially the same denials. In addition it contains the allegation that the Rhinelander Paper Company is not a stockholder in the General Paper Company, and it denies knowledge or information of the specific details of the agreement between the General Paper Company and the defendant companies holding its stock as to the distribution and ownership of its stock and the payments of dividends.

Replications are also filed which are not included in the record.

The cause being at issue upon the petition or bill of complaint, answers and replications, and an examiner having been appointed by the Circuit Court of the Minnesota District to take testimony in the suit, a petition was filed in the Circuit Court of the Eastern District of Wisconsin asking for an order directing the issue of a subpœna duces tecum addressed to L. M. Alexander, individually and as secretary and treasurer of General Paper Company; George A. Whiting, individually and as vice-president of the same company, and W. Z. Stuart, individually and as second vice-president of the same company, directing them, and each of them, to attend before the examiner at a day named, then and there to be examined and to give evidence on the part of the petitioner, and to bring with them and produce at the time and place of examination the following books, papers and documents, to-wit:

"All written contracts or agreements made and entered into by and between the above named defendant, General Paper Company, and any or all of the other above named defendants in said cause, between the 1st day of May, 1900, and the present time, showing or in any way tending to show the terms and conditions upon which the said defendant, General Paper Company, sells or controls, or in any way deals in or has sold or controlled, or in any way dealt in, the product of the said other defendants or each or any of them, between the said 1st day of May, 1900, and the present time.

"All stock books, stock ledgers and any and all other books

of the said General Paper Company showing the ownership and distribution of the stock of said General Paper Company, from the time of its organization to the present time; and also all books or papers showing the manner and proportions in which the earnings of said defendant, General Paper Company, have from the time of its organization to the present time been divided and distributed.

"Any and all books, written agreements or papers relating to or in any way bearing upon the control of the defendant, General Paper Company, from the time of its organization to the present time, over the output of any or all of the other above named defendants, whether said control consists or has consisted in restrictions upon the quantity of paper of any kind or description produced or to be produced, or in designating the style, brand or quality of paper produced or to be produced by the said other defendants or any of them.

"Any and all books, papers, documents and correspondence in the possession or under control of the said witnesses, either individually or as officers of the defendant, General Paper Company, relating to the manufacture of that certain grade of paper known as butcher's fibre, and particularly correspondence between the defendant, General Paper Company, and E. A. Edmonds, formerly of the Falls Manufacturing Company, Oconto Falls, Wisconsin, and now of the Rhinelander Paper Company, Rhinelander, Wisconsin, bearing upon the manufacture and sale of, and the distribution and apportionment of losses arising from the manufacture and sale of butcher's fibre.

"Any and all correspondence—letterpress copies, if any, of correspondence sent, as well as original letters or papers received—between the said defendant, General Paper Company, and each and all of the other defendants, showing the terms and conditions upon and under which the said defendant, General Paper Company, has from the time of its organization to the present time, sold or disposed of, and does sell or dispose of, the product of the said other defendants; it being not intended hereby to require the production of business communications passing between the parties in the ordinary course of buying and selling, such as letters merely enclosing remittances, making quotations of prices, or directing shipments to be made. (pp. 3 and 4, transcript in Nos. 381, 382, 383, 384.)

A subpœna duces tecum was accordingly issued and served on the witnesses named. (pp. 468-470, transcript in Nos. 381, 382, 383, 384.) A second subpœna duces tecum was also issued and served upon L. M. Alexander, individually and as secretary and treasurer of General Paper Company, directing him, in ad-

dition, to bring and produce at the time and place of examination all written contracts or agreements made and entered into between the 1st day of May, 1900, and the present time, by and between the General Paper Company and any and all publishers of newspapers in certain named cities, including the cities of Milwaukee and Oshkosh, in Wisconsin, for the furnishing by said General Paper Company of roll print or news print paper to said publishers. (pp. 34-40, transcript in Nos. 381, 382, 383, 384.)

The witnesses above named, who are the appellants in numbers 381, 382 and 383, respectively, appeared before the examiner in obedience to said subpœnas, but on the advice of counsel refused to answer a number of questions, or to produce for inspection by counsel for the complainant and for introduction as evidence in said cause certain books, records, papers, reports and contracts called for by counsel for the complainant. The particular questions which the witnesses refused to answer and the particular demands for the production of books and documents to which the witnesses refused to respond appear scattered through the great mass of testimony printed on pages numbered from 138 to 462 of the record in numbers 381, 382, 383 and 384. It will not be necessary here to set out these questions and demands, which are sufficiently indicated in the assignments of errors, reproduced in the specifications of errors hereinafter contained.

Somewhat later in time than the issue of the subpœnas already mentioned a subpœna was issued out of the Circuit Court for the Eastern District of Wisconsin requiring E. T. Harmon to appear and testify as a witness upon said examination. (p. 2, transcript in No. 385.) This was a simple subpœna not a subpœna *duces tecum*. Harmon appeared before the examiner and, also acting upon advice of counsel, refused to answer certain questions and to produce certain papers, orders and acceptances called for by counsel for the complainant. The testimony in which these refusals appear is contained in pages numbered from 50 to 159 of the transcript of record in No. 385. The particular refusals are sufficiently indicated in the joint assignment of errors filed by Harmon and the General Paper Company and reproduced in the specifications of errors hereinafter printed at length.

Upon the refusal of Alexander, Whiting and Stuart to answer the questions asked and to produce the books and papers called for, a petition was filed in the Circuit Court of the Eastern District of Wisconsin which set out the prior proceedings and the refusals of the witnesses in detail, and contained very general

allegations in reference to the materiality of the evidence called for. Among these allegations are the following:

"That all of the questions which the said witnesses, L. M. Alexander, George A. Whiting and W. Z. Stuart, have refused and do still refuse to answer are, as your petitioner verily believes, perfectly proper, competent and material to be answered, and all of the requests above referred to which the said witnesses, Alexander, Whiting and Stuart, have refused and do still refuse to comply with, are, as your petitioner verily believes, perfectly proper to be complied with in order that all of the material facts relating to the charge set out in the bill of complaint or petition may fully appear and be laid before the court for the proper determination of said cause."

"That the whole of said record of the meeting of the board of directors and stockholders of said General Paper Company is material, competent and proper evidence to establish the allegations of the petition herein, but that nevertheless the said Alexander, while so producing said book before the examiner, refused and declined so to do by counsel for the petitioner, and that said Alexander further refused to permit counsel for the petitioner to inspect the said book and read the entries therein contained, or offer the same in evidence, with the exception of certain isolated and fragmentary parts thereof, as appears by the testimony on file, and refused to permit the examiner to copy into the record many different pages of said record book which were formerly offered in evidence by the counsel for the petitioner and identified and initialed by the examiner when so offered."

The prayer of the petition was for an order requiring the said witnesses, Alexander, Whiting and Stuart, to appear before the judges of the Circuit Court for the Eastern District of Wisconsin to show cause why they should not be required to answer the questions and comply with the requests above referred to for the production of books, records, papers, reports and contracts, or, in the event of continued refusals, why the witnesses should not stand committed for contempt of court, and for such other and further relief as to the court might seem just and proper. (Pp. 41-47, transcript in Nos. 381, 382, 383, 384.)

The mass of testimony already taken was filed in the Circuit Court of the Wisconsin District in connection with the hearing upon this petition and the refusals complained of were indicated by reference to the pages of the testimony and the numbers of the questions on each page which the witnesses refused to answer. (Pp. 47-53, transcript in Nos. 381, 382, 384.)

Upon this petition an order to show cause was made by the Circuit Court of the Eastern District of Wisconsin, dated the first day of June, 1905, and commanding said witnesses, Alexander, Whiting and Stuart, to appear before the judge of said Circuit Court on the 6th day of June, 1905, then and there to show cause why they and each of them should not make full and proper answer to each of the questions referred to in said petition, and also fully comply with each and every of the requests mentioned in said petition, and also produce for the purposes of their examination for inspection by counsel for the petitioner, and for the purpose of being offered in evidence, the books, records, papers, reports and contracts particularly referred to in the petition and abide by such other and further order as the court might make. (P. 54, transcript in Nos. 381, 382, 383, 384.)

To this petition and order to show cause each of the witnesses, and the General Paper Company as well, put in an answer and afterwards amended answers.

The answer of the General Paper Company is contained on pages 80 to 84 of the last mentioned transcript and is as follows:

"Now comes The General Paper Company, one of the defendants in the above entitled matter, and asks leave to appear and file an answer to the order to show cause made by said court in the above entitled matter and to the petition heretofore filed in said matter by said complainant, upon which said order to show cause was made, in conjunction with the answer and objection made herein by the respondent witnesses and in affirmation of the objections and exceptions heretofore made and taken by or on behalf of said witnesses and this defendant, and for such answer it alleges and shows unto the court as follows:

"That George A. Whiting, W. Z. Stuart and L. M. Alexander, who have been ordered to show cause before this court why they and each of them should not make full and proper answer to certain questions referred to in said petition and schedules thereunto annexed, and comply with certain requests mentioned in said petition and schedules, and also produce for inspection by counsel for the petitioner and for the purpose of being offered in evidence in the cause referred to in said petition certain books, records, papers, reports and contracts, particularly referred to in the said petition and schedules, were respectively the first vice-president, second vice-president and secretary of this defendant, and said Whiting and said Alexander still are respectively first vice-president and secretary, and as such officers and not otherwise are the custodians of the books,

records, papers, reports and contracts mentioned in said order to show cause, and that the same are the books, records, papers, reports and contracts of this defendant and not of said officers and are subject to the control of this defendant, and that this defendant has objected and does object to the production of said books, records, papers, reports and contracts for inspection by counsel for said petitioner, or for the purpose of being offered in evidence in said cause. Said objection is based upon the following reasons:

"First. That the materiality of said books, records, papers, reports and contracts in the cause mentioned in said order to show cause now pending in the Circuit Court of the United States for the district of Minnesota in the third division in said district, has not been established so as to authorize a court of equity to order their inspection, production and introduction in evidence and that the same are not material, relevant or competent evidence in said cause; that said books, records, papers, reports and contracts contain matters of importance relating to the business of this defendant in no way bearing upon or touching the issues in said cause, which it would be highly injurious to the business interests of this defendant and the other defendants in said cause to make public, and this defendant submits that it ought not to be required through its officers or otherwise to disclose any portions of said books, records, papers, reports or contracts except on a proper showing that the same are material to said cause to establish some issue therein and a showing that the same are not privileged for the protection of this defendant.

"Second. That the purpose of said complainant in instituting said cause in said Circuit Court of the United States in and for the district of Minnesota in the third division of said district and in making the requests mentioned in said order to show cause for the inspection, production and introduction as evidence of said books, records, papers, reports and contracts is to establish and to compel this defendant to furnish to said complainant evidence tending to establish that it has been guilty of certain violations of the act of Congress entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, and the acts amendatory thereof or supplemental thereto, as is more fully set forth in said complainant's original petition or bill of complaint in said cause, and to subject this defendant to the penalties for such violations imposed by said act, and that to compel the production by this defendant through its said officers or otherwise of said books, records, papers, reports and contracts for

inspection and introduction as evidence in said cause would be contrary to the provisions of the fifth amendment to the Constitution of the United States, which provides that no person shall be compelled in any criminal case to be a witness against himself; and also contrary to the provisions of the fourth amendment to the Constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

"Third. That the alleged acts of this defendant complained of by the complainant in its said original petition and bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause would be, if committed by this defendant, violations of the laws of the State of Wisconsin and would subject this defendant to forfeiture of its charter and other penalties under said laws; that to compel it through its said officers or otherwise to produce said books, records, papers, reports and contracts for inspection and introduction as evidence in said cause would be to compel it to furnish evidence tending to establish that it has been guilty of such acts and to subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions hereinbefore referred to of said fourth and said fifth amendment to the Constitution of the United States.

"Fourth. That in addition to the matters above set forth the purpose of the complainant in instituting said cause in said Circuit Court of the United States for the district of Minnesota in the third division of said district and in making the requests mentioned in said order to show cause is to obtain from said last mentioned court a decree virtually annulling and enjoining this defendant from carrying out certain contracts and agreements now existing between it and the other defendants named in said cause on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said acts of Congress; that said contracts and agreements are of great value to this defendant and constitute a great part of its business, and that such virtual annullment of and injunction from carrying out said contracts and agreements would result in great injury, damage and loss to this defendant, and that to compel the production by this defendant through its said officers or otherwise of said books, records, papers, reports and contracts for inspection and introduction as evidence in said cause for the purposes aforesaid would be contrary not only to the provisions of said fourth and said fifth amendment to the Constitution of the United States, but also contrary to the well es-

tablished rule of the common law as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions which may subject him either directly or eventually to prosecution for a crime or to a forfeiture or penalty or anything in the nature of a forfeiture or penalty.

"Further answering this defendant alleges and shows unto this court that all the matters concerning which the questions referred to in said petition and schedules thereto annexed were asked and which said officers refused to answer, as stated in said petition, except certain matters which occurred long prior to the organization of this defendant and have no relation whatever to the issues in the cause aforesaid, came to their knowledge exclusively as officers of this defendant in the conduct of matters entrusted to them as such officers by this defendant, and which this defendant, from the nature of the case, was compelled to entrust to them as such officers, and that this defendant has objected and does object to said questions and to the same being answered by said officers for reasons similar to those already set forth in reference to the production, inspection and introduction in evidence of the books, records, papers, reports and contracts above mentioned, that is to say:

"First. That the materiality of said questions in the cause above mentioned has not been established so as to authorize a court of equity to order them to be answered, and that the same are not material, relevant or competent evidence in said cause.

"Second. That the purpose of said complainant in instituting said cause and in asking said questions is to establish and to compel this defendant, through its said officers, to furnish to said complainant evidence tending to establish that it has been guilty of certain violations of the acts of Congress above referred to and to subject this defendant to the penalties for such violations imposed by said acts, and that to compel this defendant through its said officers to answer said questions would be contrary to the provisions hereinbefore referred to of said fourth and said fifth amendment to the Constitution of the United States.

"Third. That the alleged acts of this defendant complained of by the complainant in its said original petition or bill of complaint in said cause and which said complainant is endeavoring to establish in said cause would be, if committed by this defendant, violations of the laws of the State of Wisconsin and would subject this defendant to forfeiture of its charter and other penalties under said laws; that to compel it through its said officers to answer the questions aforesaid would be to com-

pel it to furnish evidence tending to establish that it has been guilty of such acts, and subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions, hereinbefore referred to, of said fourth and said fifth amendment to the Constitution of the United States.

"Fourth. That in addition to the matters above set forth the purpose of the complainant in instituting said cause and in asking the questions mentioned in said order to show cause is to obtain a decree virtually annulling and enjoining this defendant from carrying out certain contracts and agreements now existing between it and the other defendants named in said cause on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said acts of Congress; that said contracts and agreements are of great value to this defendant and constitute a great part of its business and that such virtual annulment of and injunction from carrying out said contracts and agreements would result in great injury, damage and loss to this defendant, and that to compel this defendant, through its said officers, to answer the questions aforesaid in aid of the purposes aforesaid would be contrary not only to the provisions hereinbefore referred to of said fourth and said fifth amendment to the Constitution of the United States, but also contrary to the well established rule of the common law as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions which may subject him either directly or eventually to prosecution for a crime or to a forfeiture or penalty or anything in the nature of a forfeiture or penalty.

"Wherefore this defendant asks that said order to show cause be dismissed." (Pp. 80-84, transcript in Nos. 381, 382, 383, 384.)

The answers of the individual witnesses were similar to that of the General Paper Company, but contained certain allegations bearing particularly upon their own situation as officers or stockholders not only of the General Paper Company, but also of certain other defendant companies joined with the General Paper Company as defendants in the suit pending in the Minnesota Circuit Court. Thus the answer of L. M. Alexander shows that he is the president of the John Edwards Manufacturing Company, one of the defendants, and the owner and holder of stock in said company of the par value of $60,000.00; that he is secretary and treasurer of the Nekoosa Paper Company, another of the defendants, and the owner and holder of stock in said company of the par value of $40,000.00; that he is secretary of Centralia Pulp & Water Power Company, an-

other of the defendants, and the owner and holder of stock in said company of the par value of $25,000.00; and that he is also the owner and holder of stock of the General Paper Company of the par value of $6,000.00, as well as the secretary of the General Paper Company; and that the General Paper Company, the John Edwards Manufacturing Company, the Nekoosa Paper Company and the Centralia Pulp and Water-Power Company have objected and do object to the production of the books, records, papers, reports and contracts called for by counsel for inspection and for the purpose of being offered in evidence for reasons similar to those set out in the answer of the General Paper Company.

The answer of said Alexander, in addition to the matters set out in the General Paper Company's answer, contains the following:

"Further answering, this respondent alleges that he ought not to be required to answer the questions or comply with the requests or produce for inspection by counsel for the complainant or for the purpose of being offered in evidence in the cause above referred to the books, records, papers, reports and contracts referred to in the order to show cause above mentioned and in the petition and schedules annexed to the petition upon which said order to show cause was made, not only for the reasons hereinabove set forth, but also for the following reasons, that is to say:

"First. That one of the purposes of said complainant in instituting said cause in said Circuit Court of the United States in and for the District of Minnesota in the Third Division of said District and in seeking to require this respondent to answer the questions and comply with the requests and produce for inspection by counsel for the complainant and for the purpose of being offered in evidence in the cause above referred to the books, records, papers, reports and contracts aforesaid, is to establish and to compel this respondent to furnish to said complainant evidence tending to establish that he has been guilty of certain violations of the acts of Congress hereinbefore mentioned and referred to and to subject this respondent to the penalties for such violations imposed by said acts, and that to compel this respondent to answer said questions or comply with said requests or to produce for inspection or for the purpose of being offered in evidence in said cause the said books, records, papers, reports and contracts would be contrary to the provisions hereinbefore referred to of said fourth and said fifth amendment to the Constitution of the United States.

"Second. That the alleged acts of said General Paper Company and of the other defendants hereinabove named, to-wit: The John Edwards Manufacturing Company, The Nekoosa Paper Company, and Centralia Pulp & Water-Power Company, complained of by the complainant in its said original petition or bill of complaint in said cause and which said complainant is endeavoring to establish in said cause, would, if committed by said defendant companies, involve certain violations of the laws of the State of Wisconsin by this respondent and would subject him to penalties and forfeitures under said laws, and that to compel him to answer the questions or comply with the requests aforesaid or to produce for inspection or for the purpose of being offered in evidence in said cause the said books, records, papers, reports and contracts would be to compel this respondent to furnish evidence tending to establish that he has been guilty of such violations of the laws of the State of Wisconsin and to subject him to the penalties and forfeitures aforesaid, contrary to the provisions hereinbefore referred to of said fourth and said fifth amendment to the Constitution of the United States.

"Third. That one of the purposes of said complainant in instituting said cause in said Circuit Court of the United States in and for the District of Minnesota in the Third Division of said district and in seeking to require this respondent to answer the questions and comply with the requests and produce for inspection by counsel for the complainant and for the purpose of being offered in evidence in the cause above referred to the books, records, papers, reports and contracts above referred to is to establish and to compel this respondent to furnish to said complainant evidence tending to establish the allegations of the original petition or bill of complaint in said cause, which if established will result in subjecting this respondent to loss or detriment in the nature of a penalty or forfeiture, in that said The John Edwards Manufacturing Company, the Nekoosa Paper Company and Centralia Pulp & Water-Power Company, of each of which this respondent is a stockholder as aforesaid, as well as said defendant General Paper Company, of which he is also a stockholder, will be subjected under the laws of the State of Wisconsin to the forfeiture of their charters, resulting in the virtual forfeiture of the stock of this respondent in said defendant companies and to the loss and forfeiture to a large extent of the value of the interest of this respondent in said corporations of which he is a stockholder as aforesaid, and in that the contracts made through said General Paper Company as their sales agent by the other defendants above named, under

and pursuant to the agency contracts hereinbefore referred to between said General Paper Company and the other defendants above named will be virtually annulled and the property rights of said The John Edwards Manufacturing Company, the Nekoosa Paper Company and Centralia Pulp & Water-Power Company respectively in said contracts destroyed; that there are a large number of such contracts outstanding under which large sums of money, exceeding the sum of ten thousand dollars in each case, are due to each of said last named defendants, all of which, as this respondent is advised and believes, will be or may be forfeited and lost to said defendants last named and to this respondent as a stockholder therein in case the illegal combination alleged in said original petition or bill of complaint is established by the decree or judgment in said cause. And this respondent alleges that to compel him to answer the questions and comply with the requests and produce for inspection and for the purpose of being offered in evidence the books, records, papers, reports and contracts referred to in said order to show cause and the petition and schedules thereto annexed and which he has declined to answer and comply with or produce, if material to said cause would be contrary to the provisions of said fourth and said fifth amendment to the Constitution of the United States and also contrary to the well established rule of the common law and of equity jurisprudence, that no person will be compelled to discover any fact or matter which may subject him to forfeiture or penalty or anything in the nature of a forfeiture or penalty. (Pp. 89-91, Transcript in Nos. 381, 382, 383, 384.)

The answer of George A. Whiting, contained on pages 92-98 of the same record, is like that of Alexander except that his relations to the corporation defendants are as follows:

That he is the first vice president of the General Paper Company and owner and holder of stock therein of the par value of $3,500.00; that he is the president of the Wisconsin River Paper & Pulp Company, one of the defendants, and the owner and holder of stock in said last named company of the par value of over $100,000.00; and that the General Paper Company and the Wisconsin River Paper & Pulp Company object to the production of the books, records, papers, reports and contracts called for by the counsel for the complainant.

The answer of W. Z. Stuart, contained on pages 75-79 of said transcript, is similar to the answers of Alexander and Whiting except that his official relation to the General Paper Company was only until July 1, 1905.

There is an admission in the record that the stock in the

General Paper Company owned by these appellants was held by them for the benefit of other defendant corporations of which the appellants were officers or directors. (P. 301, Transcript in Nos. 381, 382, 383, 384.)

Argument having been had upon the petition and order to show cause and the answers of the witnesses and appellants, an order was made by the Circuit Court of the Wisconsin District on the 6th day of July, 1905, printed on pages 99 and 100 of said transcript, the substantial portions of which are as follows:

"Now therefore, after hearing counsel, it is ordered, adjudged and decreed:

"That the said witnesses, L. M. Alexander, George A. Whiting and W. Z. Stuart, be and they are hereby each of them directed to appear before Robert S. Taylor, special examiner in the above entitled action, at a time and place hereafter to be designated by said examiner, in the United States court house in the city of Milwaukee, Wisconsin, and there each of them directed to answer each and every of the questions put to them respectively by the counsel for said complainant, The United States of America, as set forth in the petition herein and the schedule thereunto annexed; and the said witnesses and each of them are hereby directed to produce before said examiner, at such time and place, the books, papers, records, documents, reports and contracts requested of them respectively, as more particularly appears by said petition and the schedule of refusals thereunto annexed, for the purposes of their respective examinations in said cause, and for use in evidence by the complainant, The United States of America, in said examination; and the complainant's counsel shall have the right, at such time and place and on any adjournment of said hearing before said examiner, to inspect the said books, papers, records, documents, reports and contracts and to introduce them and any of them in evidence in said cause; but the custody of said books, records, papers, documents, reports and contracts shall not be taken from said witnesses or their counsel except as may be necessary for such inspection and use in evidence, the permanent custody thereof to remain in said witnesses." (Pp. 99, 100, Transcript in Nos. 381, 382, 383, 384.)

Judge Seaman's opinion holds:

1. That the question of materiality of the evidence sought cannot be considered on this application.

2. That in respect of questions addressed to the personal knowledge of the witnesses, apart from the production of records and documents, the constitutional privilege is personal,

cannot be invoked in favor of the defendant corporations, and is removed by the amnesty provisions of the Anti-Trust Act.

3. That in respect of its records and documents the privilege inures to the General Paper Company, but is removed by the amnesty provisions above mentioned. (Pp. 62-64, Transcript in Nos. 381, 382, 383, 384.)

From this order the appeals in numbers 381, 382, 383, and 384 by Lewis M. Alexander, George A. Whiting, William Z. Stuart and General Paper Company, respectively, have been taken to this court.

In the Harmon matter similar proceedings in all respects were had. A petition was filed and order to show cause obtained which are printed on pages 3-7 and page 28 of the transcript in No. 385, and answers were put in by Harmon and the General Paper Company in all respects similar to the answers in the other cases. Harmon in his answer alleges that he was a director of the General Paper Company, a stockholder of Centralia Pulp & Water-Power Company, one of the defendants, owning and holding 160 shares of stock therein of the par value of $16,000.00, and from January, 1901, until the 5th day of June, 1905, president and manager of Grand Rapids Pulp & Paper Company, one of said defendants, and alleges positively that the papers he was asked to produce before the examiner are not and were not at the time of his examination in his custody or under his control and that he then had and now has no power to produce them or to compel their production. (Pp. 28-35, Transcript in No. 385.)

The answer of the General Paper Company to the last mentioned petition and order to show cause is contained on pages 35-39 of the transcript in No. 385.

A similar order was entered upon this petition and order to show cause and the answers of Harmon and the General Paper Company on the 8th day of July, 1905; (pp. 39, 40, Transcript in No. 385) and from this order an appeal has been taken by E. T. Harmon and the General Paper Company which is No. 385 in this court.

The various petitions and orders for the allowance of the appeals, bonds on appeal, supersedeas and citations in all of these appeals are contained in the printed transcripts. So far as we know no question arises upon any of these and no further reference will be made to them.

The assignments of error filed by the various appellants are the same as the specifications of error hereinafter contained. The witnesses Alexander, Whiting and Stuart filed separate assignments of errors which, however, were all combined and

repeated in the assignment of errors filed by the General Paper Company in connection with its appeal. (Pp. 101-123, Transcript in Nos. 381, 382, 383, 384.)

In the Harmon matter Harmon and the General Paper Company joined in one assignment of errors which will hereinafter be found as a separate specification of errors. (Pp. 41-44, Transcript in No. 385.)

SPECIFICATIONS OF ERRORS.

1. In Appeals Nos. 381, 382, 383, 384.

(The references given below are to the Transcript in Nos. 381, 382, 383 and 384.)

1. The court erred in directing the witness Alexander to produce the record book of said General Paper Company for the purpose of having the whole of pages 33 to 37 thereof, containing the minutes of the annual stockholders' meeting in December, 1900, offered in evidence by counsel for the United States. (Trans. pp. 183, 184; marg, pp. 282, 283.)

2. The court erred in directing said Alexander after having read in evidence certain portions of the pages aforesaid to read the rest of the minutes of said stockholders' meeting which he had omitted to read. (Trans. p. 186; marg. pp. 286, 287.)

3. The court erred in directing said Alexander to permit counsel for the United States to examine the records of the stockholders' meeting held in December, 1900, in order to test the correctness of the witness's statements in reference to the business done at said meeting. (Trans. pp. 187, 189; marg. pp. 288, 289, 292.)

4. The court erred in directing said Alexander to permit the examiner to copy said pages 33 to 37 inclusive of the record book of said General Paper Company for the purpose of having them offered in evidence by counsel for the United States. (Trans. p. 189; marg. pp. 291, 292.)

5. The court erred in directing said Alexander to permit the examiner to initial pages 42 to 45 inclusive of said record book, being the minutes of the stockholders' meeting of December 10, 1901. (Trans. p. 199; marg. pp. 309, 310.)

6. The court erred in directing said Alexander to exhibit said record book to counsel for the United States for examination in order to verify the testimony of said witness in reference to business done at the annual stockholders' meeting held December 10, 1901. (Trans. p. 200; marg. pp. 310, 311.)

7. The court erred in directing said Alexander to read all of the minutes of said stockholders' meeting of December 10, 1901, including certain portions which he had previously omitted to read. (Trans. pp. 201, 202; marg. p. 314.)

8. The court erred in directing said Alexander to read the whole of the report of the committee appointed at the stockholders' meeting of December 10, 1901, including certain portions which the witness had omitted to read. (Trans. p. 206; marg. p. 322.)

9. The court erred in directing said Alexander to answer the question: When the law and the by-laws of your company require you to keep the possession of these books, why do you part with them? (Trans. pp. 206, 207; marg. p. 323.)

10. The court erred in directing said Alexander to state his recollection as to the balance of the report of the committee appointed at the stockholders meeting of December 10, 1901, which he had not read. (Trans. p. 211; marg. p. 331.)

11. The court erred in directing said Alexander to answer the question, whether he refused to read the balance of said report on the ground that the testimony would tend to incriminate him. (Trans. pp. 211, 212; marg. pp. 331-333.)

12. The court erred in directing said Alexander to permit counsel for the United States to examine said record book or to take the same for the purpose of examining it to see whether there was anything anywhere therein beside what the witness had stated referring to the report of the committee above referred to. (Trans. pp. 213, 214; marg. 335, 336.)

13. The court erred in directing said Alexander to answer the question whether there was a meeting of the board of directors of said General Paper Company held in January, 1902. (Trans. p. 298; marg. p. 478.)

14. The court erred in directing said Alexander to produce for inspection by counsel for the United States and for the purpose of having the same offered in evidence the entire minutes contained in the record book of said General Paper Company of the meeting of the stockholders held December 8, 1903. (Trans. pp. 146, 150, 151; marg. pp. 228, 232, 233.)

15. The court erred in directing said Alexander to look and see whether any part of the record of the proceedings of the annual stockholders' meeting of December 8, 1903, other than

that which he had already read in evidence related in any way to any corporation defendant making the General Paper Company its sales agent or making a contract therefor. (Trans. pp. 273, 274; marg. pp. 438, 439.)

16. The court erred in directing said Alexander to answer the question whether the balance of said meeting of December 8, 1903, other than that read by the witness referred to any business between said General Paper Company and the constituent mills making the contracts with it as sales agent. (Trans. p. 275; marg. p. 440.)

17. The court erred in directing said Alexander to state the pages of said record book containing a record of said stockholders' meeting of December 8, 1903. (Trans. pp. 149, 150; marg. pp. 231, 231½, 232.)

18. The court erred in directing said Alexander to read in evidence the whole of page 70 of said record book relating to the meeting of the board of directors of said General Paper Company held December 8, 1903. (Trans. p. 147; marg. p. 229.)

19. The court erred in directing said Alexander to examine said record book for the purpose of ascertaining the numbers of the pages comprising the entire record of said meeting of the board of directors held December 8, 1903. (Trans. pp. 147, 148; marg. p. 229½.)

20. The court erred in directing said Alexander to produce for inspection by counsel for the United States and for the purpose of having the same offered in evidence the entire minutes of the meeting of the directors of said General Paper Company held December 8, 1903. (Trans. p. 148; marg. p. 230.)

21. The court erred in directing said Alexander to produce for inspection by counsel for the United States and for the purpose of having the same offered in evidence the entire minutes of the stockholders' annual meeting of said General Paper Company held in December, 1904. (Trans. pp. 275, 276; marg. pp. 440-442.)

22. The court erred in directing said Alexander to produce the record book of said General Paper Company for the purpose of having offered in evidence the record of all meetings of the board of directors held during the year 1900. (Trans. pp. 288, 289; marg. pp. 462, 463.)

23. The court erred in directing said Alexander to answer the question: Do any of those meetings of the board of directors in 1900 refer to the business between any of the corporations having a contract with the General Paper Company and

the General Paper Company? (Trans. p. 289; marg. p. 463.) (This question was answered on p. 290.)

24. The court erred in directing said Alexander to state what the meetings of the board of directors held in 1900 referred to. (Trans. p. 290; marg. pp. 464, 465.)

25. The court erred in directing said Alexander to answer the questions: How many directors' meetings were there during 1900? And, Will you give the dates of those meetings? (Trans. p. 288; marg. p. 462.)

26. The court erred in directing said Alexander to comply with the request that he should look at the record book of said General Paper Company to see if there was a meeting of the board of directors of said company on the 18th of June, 1900. (Trans. pp. 171, 172; marg. pp. 262-264.)

27. The court erred in directing said Alexander to produce before the examiner the minutes of the meetings of the executive committee of said General Paper Company. (Trans. pp. 299, 300; marg. pp. 479, 480.)

28. The court erred in directing said Alexander to answer the questions: As secretary of the General Paper Company, are you the custodian of such records? (referring to the minutes referred to in the 27th assignment of error). When did Mr. Flanders get possession of said records? When did said records leave your possession? Have you had said records within your possession within the last thirty days? (Trans. p. 300; marg. pp. 480, 481. See also Trans. p. 153; marg. pp. 236-238.)

29. The court erred in directing said Alexander to state whether the treasurer's report made to the stockholders' meeting of December 8, 1903, contained the result of all the sales of paper made by the General Paper Company. (Trans. p. 274; marg. pp. 439, 440.)

30. The court erred in directing said Alexander to state what subject said report dealt with. (Trans. pp. 274, 275; marg. p. 440.)

31. The court erred in directing said Alexander to answer the questions: Do you know the total of sales each year by the General Paper Company in value? Do your treasurer's reports show the total sales in value each year by the General Paper Company? Have you any books under your control showng the total sales each year of the General Paper Company? (Trans. p. 296; marg. pp. 474, 475.)

32. The court erred in directing said Alexander to answer the question: Do your sales each year amount to in the neighbor-

hood of ten millions of dollars in value? (Trans. p. 296; marg. p. 475.)

33. The court erred in directing said Alexander to state whether the minutes of the stockholders of each year showa that the general sales agent made a report. (Trans. p. 297; marg. p. 476.)

34. The court erred in directing said Alexander to answer the question: Does the directors' annual meeting held in December, 1900, show the presentation of a report of the sales manager? (Trans. p. 297; marg. p. 477.)

35. The court erred in directing said Alexander to answer the same question in reference to the annual directors' meetings of 1901, 1902, 1903 and 1904. (Trans. pp. 297, 298; marg. pp. 477, 478.)

36. The court erred in directing said Alexander to state: What dividends if any have been paid by the General Paper Company? (Trans. p. 296; marg. p. 475.)

37. The court erred in directing said Alexander to answer the question: Do your books show the dividends paid? (Trans. p. 297; marg. p. 476.)

38. The court erred in directing said Alexander to answer the questions: You know, do you, what dividends, if any, have been paid by the General Paper Company? and, If any dividends are paid, it is your duty to pay them? (Trans. p. 296; marg. pp. 475, 476.)

39. The court erred in directing said Alexander to produce the contracts between said General Paper Company and various publishers for the sale of news print paper. (Trans. p. 294; marg. p. 472.) (These include contracts with Milwaukee and Oshkosh publishers.)

40. The court erred in directing said Alexander to state whether the contracts just referred to (39th assignment of error) are usually on a printed blank. (Trans. p. 295; marg. pp. 472, 473.)

41. The court erred in directing said Alexander to answer the question: Do you know where that form of contract was procured—whether it was taken from the form of contract used by the International Paper Company or not? (Trans. p. 295; marg. p. 473.)

42. The court erred in directing said Alexander to answer the question: During the existence of the General Paper Company has there been a pool among these mills in connection with the General Paper Company covering fibre paper or butchers' fibre paper? (Trans. p. 290; marg. p. 465.)

43. The court erred in directing said Alexander to answer the question: Is it not a fact that certain of the mills which made butchers' fibre were compensated by the other mills and that the other mills made payments through E. A. Edmonds, who distributed the money to the mills making butchers' fibre? (Trans. p. 290; marg. p. 466.)

44. The court erred in directing said Alexander to answer the question: Is there not less profit in the manufacture of butchers' fibre than in any other paper? (Trans. p. 291; marg. p. 466.)

45. The court erred in directing said Alexander to answer the question whether the Nekoosa Paper Company was compensated for making butchers' fibre by the other companies in this combination. (Trans. p. 291; marg. p. 467.)

46. The court erred in directing said Alexander to answer the question, whether or not Mr. E. A. Edmonds, formerly of the Falls Manufacturing Company and now of the Rhinelander Paper Company, was the clearing house through which any payments were made to compensate any mill for making butchers' fibre? (Trans. p. 291; marg. p. 467.)

47. The court erred in directing said Alexander to answer the question, whether any of the defendants made such payments through E. A. Edmonds. (Trans. p. 292; marg. p. 468.)

48. The court erred in directing said Alexander to answer the question: Do you know of your own knowledge that the General Paper Company or some officer of the General Paper Company did not send checks of the separate mills to Mr. E. A. Edmonds, who sent the checks or divided up the money between the mills making butchers' fibre? (Trans. p. 292; marg. p. 468.)

49. The court erred in directing said Alexander to state whether or not any of the mills not making butchers' fibre sent checks through the General Paper Company or any officer of the General Paper Company to E. A. Edmonds for such purpose. (Trans. p. 292; marg. p. 468.)

50. The court erred in directing said Alexander to state whether the General Paper Company or any officer of said company sent the checks or the money of any of the constituent companies having contracts with it to Mr. Edmonds for the purpose of compensating the mills making butchers' fibre. (Trans. p. 292; marg. pp. 468, 469.)

51. The court erred in directing said Alexander to state whether settlements between the mills through the General Paper Company or any officer of the General Paper Company were made once in three months to compensate the mills making butchers' fibre paper. (Trans. p. 292; marg. p. 469.)

52. The court erred in directing said Alexander to state whether there was any pool between the defendant companies since the organization of the General Paper Company on any other grades of paper. (Trans. pp. 292, 293; marg. p. 469.)

53. The court erred in directing said Alexander to answer the question: Do the books which are kept under your direction or by you show the payment by any of the defendant mills since the organization of the General Paper Company to any of the other defendant mills of any sum of money to compensate any of the defendant mills making butchers' fibre? (Trans. 293; marg. p. 470.)

54. The court erred in directing said Alexander to state whether he had any discussion about the Manufacturers' Paper Company acting as sales agent for all these defendant mills, or a part of them, at some meeting in Chicago, which may have been prior to May 26, 1900, at Mr. Brocklebank's office, at which Mr. Garrison and Mr. Nash may have been present. (Trans. p. 247; marg. p. 391.)

55. The court erred in directing said Alexander to answer the question: Well, you recollect such meeting now, do you? (Trans. p. 247; marg. p. 391.)

56. The court erred in directing said Alexander to answer the question: Now, I ask if you did not attend a meeting at the Grand Pacific hotel in Chicago, at which you were present, Mr. Brocklebank, Mr. Garrison, Mr. Nash, Mr. Whiting, Mr. Kimberly, Mr. Stuart and perhaps others, at which meeting a discussion was had and a proposition made to the Manufacturers' Paper Company to act as selling agent. (Trans. pp. 247, 248; marg. p. 391.)

57. The court erred in directing said Alexander to answer the question: Do you recollect any such meeting? (Trans. p. 248; marg. p. 392.)

58. The court erred in directing said Alexander to answer the question: Did you make a statement to anyone after that meeting of what occurred at that meeting (referring to the meeting described in the 56th assignment of error)? (Trans. p. 248; marg. p. 392.)

59. The court erred in directing said Alexander to answer the following question: Did you not attend a meeting in Chicago at the Grand Pacific hotel, at which you were present, Mr. Brocklebank of the Manufacturers Paper Company, Mr. J. A. Kimberly, Mr. T. E. Nash, Mr. F. Garrison, Mr. George A. Whiting, Mr. A. N. Pride, Mr. John Van Nortwick, Mr. Charles Babcock—all of whom except Mr. Brocklebank were afterwards directors or officers of the General Paper Company—at which

meeting you discussed the plans for organizing or for procuring the General Paper Company to act as the exclusive sales agent of these defendants or some of them, the Manufacturers Paper Company I mean, and at which you afterwards discussed the plans of organizing the General Paper Company? I mean this meeting held sometime in March, 1900. (Trans. p. 249; marg. pp. 393, 394.)

60. The court erred in directing said Alexander to answer the question: At any meeting held in January, 1902, or about that time, was the subject of making any arrangement with the Manufacturers Paper Company discussed and is there any record of any such discussion? (Trans. p. 298; marg. pp. 478, 479.)

61. The court erred in directing said Alexander to answer the question: Do you know whether at any time the subject was discussed at the board of directors' meeting as to making any arrangement with the Manufacturers Paper Company about the sale of paper in the territory west of Chicago? (Trans. p. 298; marg. p. 479.)

62. The court erred in directing said Alexander to state whether he gave out a statement of what occurred at a directors' meeting of the General Paper Company held in Appleton, Wisconsin, on June 18th, 1900, to the trade paper. (Trans. pp. 236, 237; marg. p. 375.)

63. The court erred in directing said Alexander to state whether at the city of Appleton, after the meeting of the board of directors on June 18, 1900, he stated to a reporter of the trade journal in words or in substance that the contracts closing the matter were all ready and the only point to be settled was as to who was to sign them. Finally it was settled that all the mills in the state making print, manilla and fibre would sign except the Marinette & Menominee Paper Company, and whether he then gave a list of the companies who had signified their willingness to enter into contracts. (Trans. pp. 237, 238; marg. pp. 376, 377.)

64. The court erred in directing said Alexander to answer the question: Did you make that statement during the meeting of the board? (referring to the question in the 63d assignment of error). (Trans. p. 238; marg. p. 377.)

65. The court erred in directing said Alexander to answer the question: Can you, in a general way, state what the principal product of the defendant mills is, whether it is news print paper or other classes? (Trans. 295, 296; marg. p. 474.)

66. The court erred in directing the witness George A. Whiting to answer the question: Did you have any meeting at Chicago where you discussed the subject of making the Manufac-

turers' Paper Company the selling agent of these defendants or any of them? (Trans. p. 307; marg. p. 493.)

67. The court erred in directing said Whiting to state whether he had ever had any business with Mr. J. C. Brocklebank. (Trans. p. 308; marg. p. 494.)

68. The court erred in directing said Whiting to answer the question: Was this (the organization of a company for the purpose of selling paper) finally agreed on between you gentlemen before the final organization of the company? (Trans. p. 310; marg. p. 497.)

69. The court erred in directing said Whiting to answer the question: Did you have any idea prior to May 26th, 1900, what proportion of the stock your company was going to get? (Trans. pp. 315, 316; marg. p. 505.)

70. The court erred in directing said Whiting to answer the question: Prior to the time you subscribed for the stock for your mill, did you have any understanding with the other gentlemen who went into this organization as to the amount of stock which should be given to each one of you? (Trans. p. 316; marg. p. 506.)

71. The court erred in directing said Whiting to answer the question: Did you mean to say that you, as one of the principal men, caused the General Paper Company to be organized to handle more than ten million dollars of products per year and that you do not recollect the plan on which it was organized? (Trans. p. 336; marg. p. 536.)

72. The court erred in directing said Whiting to answer the question: You have no recollection of an understanding between you gentlemen as to the basis of the division of the stock at all? (Trans. pp. 336, 337; marg. pp. 536, 537.)

73. The court erred in directing said Whiting to answer the question: You have no recollection of meeting with these gentlemen and agreeing on the form of a contract? (Trans. p. 337; marg. p. 537.) (This question was answered by the witness.)

74. The court erred in directing said Whiting to answer the question: You remember that a contract was adopted at some meeting, do you? (Trans. p. 337; marg. pp. 537, 538.)

75. The court erred in directing said Whiting to answer the question: Did you ever have any talk with Mr. Bossard about making the General Paper Company its selling agent? (Trans. p. 327; marg. p. 523.)

76. The court erred in directing said Whiting to answer the question: Did you on or about February 5, 1902, which is the date—which the Itasca Paper Company entered into a contract with the General Paper Company making it its exclusive selling

agent for certain grades of paper, have any conversation with Mr. Bossard of that company about entering into that contract with the General Paper Company? (Trans. p. 327; marg. p. 523.)

77. The court erred in directing said Whiting to state whether Mr. H. C. McNair declined to take stock in the General Paper Company at a talk had between the witness and Mr. McNair at Appleton about entering into a contract with the General Paper Company before the organization of the General Paper Company. (Trans. p. 328; marg. pp. 524, 525.)

78. The court erred in directing said Whiting to state what conversation he had with Mr. McNair in Chicago one day either in the lobby of the *the* General Paper Company or at some hotel. (Trans. p. 329; marg. pp. 526, 527.)

79. The court erred in directing said Whiting to answer the question: Did you have any conversation with him (McNair) about the Northwest Paper Company entering into a contract with the General Paper Company? (Trans. p. 329, 330; marg. p. 527.)

80. The court erred in directing said Whiting to answer the question: How do you know he (McNair) had concluded to go in? (meaning into the General Paper Company.) (Trans. p. 330; marg. p. 527.)

81. The court erred in directing said Whiting to state whether he had any conversation with McNair in reference to the Northwest Paper Company making the General Paper Company its selling agent. (Trans. p. 330; marg. p. 528.)

82. The court erred in directing said Whiting to answer the question: State whether you did or did not have any conversation with Mr. McNair in which you discussed with him the subject of the Northwest Paper Company making the General Paper Company its general agent prior to the time it went into the combination. (Trans. p. 330; marg. p. 528.)

83. The court erred in directing said Whiting to answer the question: Did you have any conversation with Mr. McNair prior to the time his company entered into this contract with the General Paper Company making it the exclusive selling agent—about his company making any such contract? (Trans. pp. 330, 331; marg. p. 528.)

84. The court erred in directing said Whiting to answer the question: Do you not know from your own knowledge that for nearly two years the Northwest Paper Company refused to make the General Paper Company its selling agent? (Trans. p. 331; marg. p. 529.)

85. The court errd in directing said Whiting to state whether

at the last annual meeting of the General Paper Company held in December, 1904, he heard the subject discussed as to the Petoskey Fibre Paper Company renewing its contract. (Trans. p. 335; marg. p. 534.)

86. The court erred in directing said Whiting to answer the question: Was there any discussion at that meeting about dropping Mr. Cheeseman from the board of directors because his company had not entered into a contract renewing its contract making the General Paper Company its selling agent. (Trans. p. 335; marg. pp. 534, 535.)

87. The court erred in directing said Whiting to answer the question: After the organization of the General Paper Company did you have any conversation with any of the officers of the International Paper Company about keeping out of this territory west of Chicago? (Trans. p. 345; marg. p. 550.)

88. The court erred in directing said Whiting to answer the question: Did you ever hear of a pool on butchers' fibre between any of the defendant mills? (Trans. pp. 333, 334; marg. p. 533.)

89. The court erred in directing said Whiting to state whether he never heard of an arrangement whereby certain of the defendant mills made payments through the General Paper Company or some officer of the General Paper Company to certain other of the defendant mills which manufactured butchers' fibre. (Trans. p. 334; marg. p. 534.)

90. The court erred in directing said Whiting to answer the question: Did you ever hear of such an arrangement between any of these parties? (referring to the arrangement mentioned in the 89th assignment of error). (Trans. p. 334; marg. p. 534.)

91. The court erred in directing the witness W. Z. Stuart to answer the question: What *has* been the yearly sales of the General Paper Company for these mills for which you are the exclusive selling agent under these contracts? (Trans. pp. 361, 362; marg. p. 574.)

92. The court erred in directing said Stuart to answer the question: Do your books of account show the amount of yearly sales by the General Paper Company as the selling agent of these different companies? (Trans. p. 362; marg. pp. 574, 575.)

93. The court erred in directing said Stuart to answer the question: Do you keep books of account at your office in Chicago which show the amount of paper in weight and in dollars and cents sold for each mill in each year? (Trans. p. 362; marg. p. 575.)

94. The court erred in directing said Stuart to answer the question: Do you know without referring to those books about

the yearly sales for all these defendant mills? (Trans. p. 362; marg. p. 575.)

95. The court erred in directing said Stuart to answer the question: What amount of paper do you sell for each, or did you sell for each of these defendant mills in the year 1900? (Trans. p. 362; marg. p. 575.)

96. The court erred in directing said Stuart to answer the question: What were the gross sales for all the mills for which your company is the exclusive agent under the contracts in evidence for the year 1900? (Trans. p. 362; marg. p. 575.)

97. The court erred in directing said Stuart to answer the question: What was the amount of sales in dollars and cents made for each mill for which the General Paper Company was the exclusive selling agent in the years 1901, 1902, 1903 and 1904? (Trans. p. 362; marg. p. 576.)

98. The court erred in directing said Stuart to answer the question: Do you know what the amount is? (referring to the sales referred to in the 97th assignment of error). (Trans. p. 362; marg. p. 576.)

99. The court erred in directing said Stuart to answer the question: What was the gross amount of sales in dollars for all the companies during each year which I have referred to? (Trans. p. 363; marg. p. 576.)

100. The court erred in directing said Stuart to answer the question: Do you know what amount of dividends have been paid by the General Paper Company each year? (Trans. p. 363; marg. p. 576.)

101. The court erred in directing said Stuart to answer the question: Will you state the amount of dividends paid by the General Paper Company each year? (Trans. p. 363; marg. p. 576.)

102. The court erred in directing said Stuart to answer the question: Do your books show the gross receipts from commissions for the sale of paper? (Trans. p. 363; marg. pp. 576, 577.)

103. The court erred in directing said Stuart to answer the question: Do you know the gross amount of commissions received each year for the sale of paper under the contracts in evidence? (Trans. p. 363; marg. p. 577.)

104. The court erred in directing said Stuart to answer the question: Do you keep books showing the total gross receipts from commissions from each one of these defendant companies for the sale of paper, the expenses of the business and the net profits? (Trans. p. 363; marg. p. 577.)

105. The court erred in directing said Stuart to answer the question: Do you know that of your own knowledge? (referring

to the matters mentioned in the 104th assignment of error). (Trans. p. 363; marg. p. 577.)

106. The court erred in directing said Stuart to answer the question: Do you keep books of account showing the price of paper received by each of the defendant companies and sold by your company? (Trans. p. 363; marg. p. 577.)

107. The court erred in directing said L. M. Alexander, George A. Whiting and W. Z. Stuart, and each of them, to appear before Robert S. Taylor, special examiner in the above entitled action, and answer each and every of the questions put to them respectively by the counsel for said complainant as set forth in the petition in the above entitled matter and in the schedules thereunto annexed.

108. The court erred in directing said Alexander, Whiting and Stuart, and each of them, to produce before said examiner the books, papers, records, documents, reports and contracts requested of them respectively as set forth in said petition and schedules for the purposes of their respective examinations in said cause and for use in evidence by the complainant in said examination.

109. The court erred in ordering that said complainant's counsel shall have the right to inspect the said books, records, papers, documents, reports and contracts.

110. The court erred in ordering that said complainant's counsel shall have the right to introduce the said books, papers, records, documents, reports and contracts and any of them in evidence in said cause.

2. Specifications of Errors in Appeal No. 385.

(The references given below are to the Transcript in No. 385.)

1. The court erred in directing said E. T. Harmon to answer the question: Did the Grand Rapids Pulp & Paper Company have any arrangement with the General Paper Company during the year 1904 with reference to a fixed or flat price for hanging paper sold during that year as between the two companies? (Trans. p. 150; marg. p. 190.)

2. The court erred in directing said Harmon to answer the question: Was there any arrangement between the Grand Rapids Pulp & Paper Company was to be credited for hanging with relation to the amount or price for which the Grand Rapids Pulp & Paper Company was to be credited for hanging paper per hundred pounds sold during the year 1904? (Trans. p. 152; marg. p. 192.)

3. The court erred in directing said Harmon to answer the question: Was there not a stated or fixed price for hanging paper at which the Grand Rapids Pulp & Paper Company was to be credited in the first instance as between the General Paper Company and the Grand Rapids Pulp & Paper Company? (Trans. p. 152; marg. pp. 192, 193.)

4. The court erred in directing said Harmon to answer the question: Was there not an arrangement between the General Paper Company and the Grand Rapids Pulp & Paper Company whereby the mill was to be credited with a fixed or flat price for hanging paper during the year 1904 and was to receive subsequently its proportion of the amount over and above that fixed price at which the General Paper Company might sell that paper? (Trans. p. 152; marg. p. 193.)

5. The court erred in directing said Harmon to answer the question: Was not the surplus or excess above a certain flat or fixed price for hanging paper sold by the General Paper Company or through the General Paper Company divided up among the mills making hanging paper in proportion to their output? (Trans. p. 152; marg. p. 193.)

6. The court erred in directing said Harmon to answer the same question with reference to the years 1903, 1902, 1901 and 1900. (Trans. pp. 152, 153; marg. pp. 193, 194.)

7. The court erred in directing said Harmon to answer the question: Did not all of the mills manufacturing hanging paper receive a credit of a certain fixed amount or price per hundred pounds for such paper from the General Paper Company and receive a dividend comprising its share of the surplus over and above that flat price at which the General Paper Company might sell the product? (Trans. p. 153; marg. p. 194.)

8. The court erred in directing said Harmon to answer the question: Did not each mill making the General Paper Company its selling agent receive from the General Paper Company a fixed price for its product—a price equal to all of the mills manufacturing the grade of paper in question, and subsequently receive a proportion of all that might be realized by the General Paper Company through the sale of that paper above that price? (Trans. p. 153; marg. pp. 194, 195.)

9. The court erred in directing said Harmon to answer the question: Was not all of the balance realized above a fixed price for paper distributed among the mills in the General Paper Company in the proportion to their output? (Trans. p. 153; marg. p. 195.)

10. The court erred in directing said Harmon to answer the question: Did not the General Paper Company take from the

constituent mills the paper manufactured by them at a fixed or stated price and then was not the balance realized above that price through the sale of the paper distributed among the constituent mills in proportion to their output so as to equalize the prices as among the constituent mills? (Trans. pp. 153, 154; marg. p. 195.)

11. The court erred in directing said Harmon to answer the question: By the term "constituent mills" I refer to mills which have made General Paper Company their exclusive selling agent. Taking the term in that sense, I repeat the question. (Trans. p. 154; marg. p. 196.)

12. The court erred in directing said Harmon to answer the question: I ask you the same question as the last question with particular reference to news print paper. (Trans. p. 154; marg. p. 196.)

13. The court erred in directing said Harmon to answer the question: Was not the news print paper manufactured by the Grand Rapids Pulp & Paper Company sold through the General Paper Company or to the General Paper Company at a fixed or stated price per hundred pounds? (Trans. p. 155; marg. p. 197.)

14. The court erred in directing said Harmon to answer the question: State whether or not the General Paper Company did not take the news print paper manufactured by the Grand Rapids Pulp & Paper Company at a fixed and stated price. (Trans. p. 155; marg. p. 197.)

15. The court erred in directing said Harmon to answer the question: Did not the General Paper Company take the news print paper manufactured by the mills of which it was the exclusive selling agent at a fixed and stated price? (Trans. p. 155; marg. p. 198.)

16. The court erred in directing said Harmon to answer the question: Did not the General Paper Company take news print paper manufactured by the mills of which it was the exclusive selling agent at a stated price and was not the balance realized from the sale of such paper over and above that stated price divided among those mills making news print paper in proportion to their output so as to equalize the price among such mills? (Trans. pp. 155, 156; marg. p. 198.)

17. The court erred in directing said Harmon to answer the question: I ask you that question with particular reference to the year 1900? (Trans. p. 156; marg. 198.)

18. The court erred in directing said Harmon to answer the same question with reference to the years 1901, 1902, 1903, 1904 and 1905. (Trans. p. 156; marg. pp. 198, 199.)

19. The court erred in directing said Harmon to answer the question: Do the books of the Grand Rapids Pulp & Paper Company show whether or not the paper, both hanging and news print, manufactured by that company was disposed of through the General Paper Company at a fixed or stated price? (Trans. p. 156; marg. p. 192.)

20. The court erred in directing said Harmon to answer the question: Do the books of the Grand Rapids Pulp & Paper Company show or give any information as to whether or not the Grand Rapids Pulp & Paper Company received from or through the General Paper Company, either directly or indirectly, any credit representing a proportion received by the Grand Rapids Pulp & Paper Company of the balance realized over and above a fixed and stated price for paper manufactured by that company? (Trans. p. 156; marg. pp. 199, 200.)

21. The court erred in directing said Harmon to answer the question: State whether or not there was any arrangement or understanding among the mills manufacturing hanging paper or among those mills and the General Paper Company whereby the prices which each mill should receive for hanging paper were equalized. (Trans. p. 157; marg. p. 201.)

22. The court erred in directing said Harmon to answer the question: I ask you the same question with reference particularly to news print paper. (Trans. p. 157; marg. p. 201.)

23. The court erred in directing said Harmon to produce every order secured by the General Paper Company and filled by the Centralia Pulp & Water-Power Company and the acceptance thereof by the latter company so that the same could be submitted to the inspection of counsel for the United States and put in evidence by him. (Trans. p. 158; marg. p. 202.)

24. The court erred in directing said Harmon to state whether he had given all the excuses he desired to give for not answering the question whether he would produce the orders just referred to before the examiner so that counsel for the United States might put them in evidence. (Trans. p. 158; marg. pp. 202, 202¼.)

25. The court erred in directing said Harmon to appear before Robert S. Taylor, special examiner in the above entitled action, and answer each and every of the questions put to him by the counsel for said complainant as set forth in the petition in the above entitled matter and in the schedule thereunto annexed.

26. The court erred in directing said Harmon to produce before said examiner the papers, orders and acceptances requested by counsel for said complainant as set forth in said petition

and schedule for the purposes of his examination in said cause and for use in evidence by the complainant in said examination.

27. The court erred in ordering that said complainant's counsel shall have the right to inspect the said papers, orders and acceptances.

28. The court erred in ordering that said complainant's counsel shall have the right to introduce the said papers, orders and acceptances and any of them in evidence in said cause.

ANALYSIS AND SUMMARY OF SPECIFICATIONS OF ERRORS.

Before proceeding to the argument on the questions of law involved, it may be helpful to present to the court a brief summary of the evidence, documentary and oral, required of the witnesses by the orders appealed from, and to group in classes the specifications of errors according to the subjects to which they relate.

The questions which the witnesses refused to answer fall naturally into two classes according as they call for documentary or oral evidence. These may again be subdivided according to the subject to which they relate. The specifications of error, based as they are upon orders directing answers to questions under these various groups, may be arranged under the same subdivisions.

(a) Under the head of documentary evidence the questions and specifications of error may be grouped as follows:

Questions put to Mr. Alexander requesting him to produce the record book of the General Paper Company for the purpose of having the whole of pages 33 to 37 thereof, containing the minutes of the annual stockholders' meeting of December, 1900, offered in evidence by counsel for the United States. After having read certain portions of these minutes bearing upon the election of directors, the names of the stockholders voting, and the amount of stock voted, the witness was requested to read the balance, without any statement being made of the purpose for which it was to be read. The witness was also requested to permit counsel for the United States to examine the whole of said minutes in order to test the correctness of the witness's statements in reference to the business done at said meeting. (Specifications Nos. 1-4 in Appeals Nos. 381, 382, 383, 384.)

Similar requests in reference to the entire minutes of the stockholders' meeting of December 10, 1901. (Specifications Nos. 5-7.)

Similar requests in regard to the report of a committee appointed at the stockholders' meeting of December 10, 1901. (Specifications Nos. 8-12.)

Similar requests as to the minutes of the stockholders' meeting of December 8, 1903. (Specifications Nos. 14-17.)

Similar requests in reference to the minutes of the directors' meeting of December 8, 1903. (Specifications Nos. 18-20.)

Similar requests in regard to the minutes of the stockholders' annual meeting of December, 1904. (Specification No. 21.)

Similar requests in reference to the record of all meetings of the board of directors held during the year 1900. (Specifications Nos. 22-26.)

Similar requests in reference to the minutes of the meetings of the executive committee. (Specifications Nos. 27-28.)

Requests calling for statements in reference to contents of treasurer's reports in reference to the total sales in value made each year by the General Paper Company. (Specifications Nos. 29-32.)

Questions in reference to the reports of the general sales agent made at the stockholders' and directors' annual meetings. (Specifications Nos. 33-35.)

Questions calling for a statement of the amount of dividends paid by the General Paper Company. (Specifications Nos. 36-38.)

Questions calling for the production of the contracts between the General Paper Company and various publishers, including Wisconsin publishers, for the sale of news print paper and in reference to the form of such contracts. (Specifications Nos. 39-41.)

Mr. Stuart was asked whether the books of account showed the amount of yearly sales by the General Paper Company as the selling agent of the different defendants. (Specifications Nos. 92, 93.)

He was also asked to state whether the books showed the General Paper Company's gross receipts from commissions for the sale of paper. (Specifications No. 102, 104.)

He was also asked whether he kept books of account showing the price of paper received by each of the defendant companies and sold by the General Paper Company. (Specification No. 106.)

All of the foregoing objections are included in a comprehensive way in specifications Nos. 108-110.

Mr. Harmon was asked to state whether the books of the Grand Rapids Pulp & Paper Company showed a fixed or stated price for paper manufactured by it and disposed of through the General Paper Company and whether said books show whether the Grand Rapids Pulp & Paper Company received through the General Paper Company any credit of a balance realized over and above a fixed and stated price for paper manufactured by that company. (Specifications Nos. 19, 20, in appeal No. 385.)

Mr. Harmon was also asked to produce for inspection and to be offered in evidence by counsel for the United States all orders secured by the General Paper Company and filled by the Centralia Pulp & Water-Power Company and the acceptance thereof by the latter company. (Specification No. 23.)

All the foregoing questions calling for documentary evidence were objected to by counsel for the defendant corporations as irrelevant, incompetent and immaterial.

They were also objected to by the witnesses in their own behalf and in behalf of the defendant companies of which they were officers, and by the General Paper Company, as calling for evidence which the witnesses and the defendant companies were privileged from furnishing to the Government under the immunities contained in the fourth and fifth amendments to the federal constitution.

The objection on the ground of immateriality was renewed and continually repeated throughout the examinations of the witnesses. As one method of emphasizing the objection, it appears from the record in a number of instances where certain portions of the record books were submitted to examination by counsel for the plaintiff that other portions of the same book were covered up by sheets of paper so as not to come under the inspection of counsel. (Pp. 174, 211, 262, 264, transcript in Nos. 381, 382, 383 and 384.)

The objection was also put in the general form of an objection to a "fishing examination." (Pp. 150, 184, 200, 275 of the same transcript.)

The objection based upon the privilege of immunity from self-incrimination under the federal constitution is set up in the answers of the several witnesses and of the General Paper Company filed in the circuit court in the proceedings in which these appeals are taken. These answers have already been set out in the preceding statement of facts.

(b) Under the head of oral evidence the questions and specifications of error may be grouped as follows:

Questions in reference to preliminary conversations, understandings or agreements prior to the organization of the General Paper Company in May, 1900. (Specifications Nos. 54-64; 66, 67; 68-74; and 77-84; transcript in Nos. 381, 382, 383, 384.)

Questions referring to subsequent negotiations had with the object of extending the business relations of the General Paper Company with corporations not then having contract relations with it. (Specifications Nos. 13, 60; 75, 76; 85, 86, 87, in same transcript.)

Questions calling for information as to the total annual sales of the General Paper Company. (Specifications Nos. 31, 32; 91-99.)

Questions calling for a statement of the dividends declared by the General Paper Company. (Specifications Nos. 36, 38; 100, 101.)

Questions as to commissions received by the General Paper Company on sales made by it as agent of the other defendants. (Specifications Nos. 102-105.)

Questions in reference to a pool among the defendant mills in connection with the General Paper Company covering fiber paper or butchers' fiber paper. (Specifications Nos. 42-53; 88-90.) It may be proper to state in this connection that the original bill of complaint contains no allegations or charges of such a pool.

Questions asked of Mr. Harmon having for their object the establishment of the charge of an agreement between the General Paper Company and the other defendants whereby each mill was to be credited by the General Paper Company with a fixed or flat price for its products and should subsequently receive a proportion of any surplus or excess above that price obtained by the General Paper Company. (Specifications Nos. 1-22 in Harmon's Appeal No. 385.)

Various questions connected with those relating to documentary evidence and calling for oral testimony of no importance except as so connected do not seem to require separate reference.

Certain other questions objected to as calling for legal conclusions and therefore irrelevant, incompetent and immaterial, are included in Specifications Nos. 9, 11 and 28 in Appeals Nos. 381, 382, 383 and 384 and Specification No. 24 in Appeal No. 385.

All the foregoing questions calling for oral evidence were objected to by counsel for the defendant corporations as irrelevant, incompetent and immaterial.

They were also objected to by the witnesses, in their own behalf and in behalf of the defendant companies of which they were officers, and by the General Paper Company as calling for evidence which the witnesses and the defendant companies were privileged from furnishing to the Government under the immunities contained in the fourth and fifth amendments to the federal constitution.

In connection with these objections the appellants contend that the requirement to give evidence, whether oral or documentary, although directly made to individual witnesses, nevertheless in substance is a requirement operating upon the defendant companies themselves, who are therefore at liberty in their own behalf to urge all the objections which an individual might urge when called as a witness in an action to which he was a party.

ARGUMENT.

A.

QUESTIONS RAISED BY THIS APPEAL.

The grounds upon which appellants contend that the orders of the court below are erroneous are these:

I. THAT THE EVIDENCE, DOCUMENTARY AND ORAL, WHICH THE WITNESSES WERE REQUIRED TO PRODUCE WAS NOT SHOWN TO BE MATERIAL TO PLAINTIFF'S CASE.

II. THAT THE DOCUMENTARY EVIDENCE CALLED FOR WAS NOT SHOWN TO BE IN THE POSSESSION OR UNDER THE CONTROL OF THE WITNESSES.

III. THAT THE EVIDENCE, DOCUMENTARY AND ORAL, REQUIRED TO BE PRODUCED, WAS IN THE NATURE OF INCRIMINATING EVIDENCE WHICH THE WITNESSES AND THE DEFENDANTS ARE PRIV-

ILEGED FROM FURNISHING TO THE PLAINTIFF UNDER THE PROVISIONS OF THE FEDERAL CONSTITUTION AND THE WELL RECOGNIZED PRINCIPLES OF EQUITY PROCEDURE.

I.

THAT THE EVIDENCE, DOCUMENTARY AND ORAL, WHICH THE WITNESSES WERE REQUIRED TO PRODUCE WAS NOT SHOWN TO BE MATERIAL TO PLAINTIFF'S CASE.

a. Documentary Evidence.

As far as the documentary evidence in question is concerned it is an undisputed fact that the books and documents called for are the books and documents and the property of the General Paper Company or some other of the defendant corporations. The proceeding must, therefore, so far as the defendants are concerned, be considered as only one method of compelling the production of books and documents belonging to parties to the suit, and it is plainly governed by the rules prescribed for the protection of parties from whom a discovery is demanded whether through a bill for discovery or through an application for an order directing the production of books and documents as evidence to establish the opposite party's cause of action.

The rules which apply to bills for discovery are thus stated in the standard works on equity pleading and practice:

"The right of a plaintiff in equity to the benefit of a defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case and does not extend to a discovery of the manner in which or of the evidence by means of which the defendant's case is to be established. * * * It is true that in those cases the question did not come before the court upon demurrer; but the rule is the same in whatever way the question may be raised: on demurrer, on exceptions to the defendant's answer, or on application to produce documents in the defendant's possession."

1st Daniell's Ch. Pl. & Pr. 5 Am. Ed. *pp. 579, 580.

"It is the right, as a general rule, of a plaintiff in equity to exact from a defendant a discovery upon oath as to all the matters of fact which being well pleaded in the bill are material to the plaintiff's case and which the defendant does not by his form of pleading admit. . . . The right of a plain-

tiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case and does not extend to a discovery of the manner in which the defendant's case is to be exclusively established or to evidence which relates exclusively to his case."

Wigram's Law of Discovery, 1st Am. Ed. p. 15.

"It may be affirmed to be a general doctrine in equity that as the object of the court in compelling the discovery is either to enable itself or some other court to decide on matters in dispute between the parties, the discovery sought must be material either to the relief prayed by the bill or to some other suit actually instituted or capable of being instituted. If, therefore, the plaintiff does not show by its bill such a case as renders the discovery which he seeks material to the relief, * * * he shows no title to the discovery and consequently the demurrer will hold."

Story's Eq. Pl., Sec. 565.

"It may be added that this objection of immateriality may be to the whole bill, or to a part of the bill, or to a part only of the interrogatories, or to a particular defendant only."

Story's Eq. Pl., Sec. 568.

The plaintiff must show by clear averment the materiality of the documents sought to be disclosed, a rule which applies not only to bills of discovery but also to proceedings under the statute to compel the production of books or papers upon or in preparation for trial.

"To entitle the applicant to an order for production and inspection it must be shown that the document sought contains material evidence and that the production and inspection are necessary to the claim or the defense of the applicant. * * * To this end the applicant must show the particular information which is required and that there are entries in the documents sought as to the matter in regard to which the inspection is denied, or give other facts sufficient to satisfy the court that material evidence is contained in the document."

23 A. & E. Enc. of Law, pp. 176, 177.
Owhyee L. & I. Co. vs. Tautphaus, 109 Fed. R. 547.
Condict vs. Wood, 25 N. J. Law 319.
Bank vs. Mansfield, 48 Ill. 494.
Lester vs. People, 150 Ill. 408.
Bentley vs. People, 104 Ill. App. 353.
Wynn vs. Taylor, 109 Ill. App. 603.

Walsh vs. Press Co., 48 N. Y. App. Div. 333.
S. F. Copper M. & R. Co. vs. Humphrey, 111 Fed. R. 772.
Eschbach vs. Lightner, 34 Md. 528, 533.
Jenkins vs. Bennett, 40 S. C. 393, 400.
Berry vs. Matthews, 7 Ga. 457, 462, 463.

A plaintiff's right to any compulsory production of books is strictly limited to such documents and parts of documents as contain evidence relevant to plaintiff's case. His right to inspect is never larger than his right to read in evidence. The defendant is not compelled to discover his evidence if it cannot tend to establish affirmatively the case of the plaintiff.

Hare on Discovery, 187, 198.
Compton vs. Earl Gray, 1 Y. & J. 154.
Bolton vs. Liverpool, 3 Sim. 489; S. C. 1 My. & K.
Harris vs. Harris, 3 Hare 450.
Van Kleeck vs. Ref. Dutch Ch., 6 Paige 600; S. C. 20 Wend. 458.

Before the plaintiff is entitled to the production of a given document he must show *aliunde* that its contents are such as to entitle him to read it in evidence. He cannot compel production in order to prove that he is entitled to production.

Wigram's Law of Discovery, Sec. 293.
Story vs. Lennox, 1 Myl. & Cr. 534.
Langdell on Eq. Pl., Sec. 164.
Bligh vs. Benson, 7 Price 205.
Stroud vs. Deacon, 1 Vesey 27.
Barnett vs. Noble, 1 Jacob & W. 227.

Any party who is required to produce his books of account or other documents may seal such portions thereof as he swears contain nothing relating to the purposes of the discovery sought, and his affidavit that the parts so sealed do not relate to the matters in litigation is sufficient protection.

23 A. & E. Enc. of Law, p. 182.
2 Wait's Pr. 548.
Titus vs. Cortelyou, 1 Barb. 444.
Robbins vs. Davis, 1 Blatchf. 238, 242.
Campbell vs. French, 2 Cox Ch. Cas. 286.
Girard vs. Penswick, 1 Wilson Ch. 222.
Pynchon vs. Day, 118 Ill. 9.

The English law about the production of documents has been thus fully cited because the various acts of Congress under which the proceedings below were taken have been evidently drawn with careful intent to permit this interference with private rights only so far as is absolutely necessary for the administration of justice and in strict accord with the chancery practice of England in regard to the production of documents.

The examination of the appellant witnesses took place before an examiner appointed by the circuit court of the district of Minnesota under the practice prescribed by Equity Rule No. 67. This rule contains no provision for the issue of subpoenas but has the following clause:

> "In case of refusal of witnesses to attend to be sworn or to answer any question put by the examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories."

Rule 78 in reference to the taking of testimony before a commissioner, a master, or an examiner appointed in any cause, provides for the issue of subpoenas in the usual form by the clerk, and then proceeds as follows:

> "and if any witness shall refuse to appear or to give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue thereupon by order of the court or of any judge thereof in the same manner as if the contempt were for not attending or for refusing to give testimony in the court."

It will be seen that there is nothing in either of these rules relating to the issue of subpoenas *duces tecum* or to the punishment of witnesses disobeying such a writ.

The procedure adopted in these cases to compel the production of books and papers was apparently intended to be in accordance with that prescribed in Section 869 of the revised statutes for the issue of subpoenas duces tecum under a *dedimus potestatem*. Neither this statute nor any other that we have been able to find, nor any rule of court, expressly authorizes the issue of subpoenas duces tecum in connection with oral examinations before examiners, or in connection with depositions taken *de bene esse*. It is by no means clear whence the authority for the course taken is to be found. The provisions of the section referred to are as follows:

"Subpoenas duces tecum under a dedimus potestatem.

When either party in such suit applies to any judge of a United States court in such district or Territory for a subpoena commanding the witness therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner, at the time and place stated in the subpoena, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court."

Particular attention is called to the provision in the section above quoted that the judge must be satisfied that there is reason to believe that the document called for *is in the possession or power of the witness* and that the same, if produced, *would be competent and material evidence for the party applying therefor.*

Further as showing the care with which Congress has in every instance restricted the power of the courts in favor of parties from whom a compulsory production of books and papers is required, we cite from the judiciary act of 1789 the provision which is now incorporated in the revised statutes as Section 724:

"Power to order production of books and writings in actions at law.

In the trial of action at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases

and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases or nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

Under the section last quoted it is held that the production will not be ordered unless it appear affirmatively that the circumstances authorizing an order on a party to a suit to produce books or papers are those in which a discovery would be decreed in chancery and the evidence sought must be pertinent to the issue.

Jacques vs. Collins, 2d Blatchf. 23.

"The party must show that the paper exists and is in the control of the other party, that it is pertinent to the issue, and that the case is such that a court of equity would compel its discovery."

Iasigi vs. Brown, 1 Curtis, C. C. 401;
Russell vs. McLellan, 3 W. & M. 157.

By equity rule 33, adopted March, 1822, it was provided:

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit courts shall be regulated by the practice of the High Court of Chancery in England."

The act of May 8, 1872, and the rule just quoted, were effectual to adopt the equity proceedure of the English High Court of Chancery in all cases not covered by the law of Congress or rule of court.

Story vs. Livingston, 13 Peters 359.

Equity rule 90, adopted March 2, 1842, is as follows:

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied, consistently with local circumstances and the local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

In the case of Thompson vs. Worcester, 114 U. S. 104, 112, decided in 1884, there is a note by the court, explanatory of rule 90, in part as follows:

"Reference is made to the first edition of Daniell's (published 1837) as being, with the second edition of Smith's Practice (published in the same year), the most authoritative of English Chancery practice in use in March, 1842, when our equity rules were adopted."

As to the authority of the early New York Chancery Reports (Johnson, Paige, etc.) upon questions of practice in equity in the United States courts, see Bates on Federal Procedure, Vol. 1, Sec. 22, giving the views of Hon. Samuel F. Miller, a former justice of this court, as stated in an address before the law department of the University of Pennsylvania, Oct. 1, 1888.

In Caspary vs. Carter, 84 Fed. R. 416, which was an application for the production of books and papers in an action at law, under Sec. 724 of the revised statutes, the court (Putnam, circuit judge) said:

"The only substantial allegations as to the materiality of the books whose production is asked is that they will 'tend to prove the issues in this action in the mover's favor,' and 'will tend to prove that the defendant in question did not make a bona fide contribution to the capital of the firm.' In other words, the plaintiff does not seek discovery of facts, but of matters of evidence which it is supposed will have more or less tendency to establish facts. The extent to which the affidavit accompanying the plaintiff's application goes is that the affiant *'believes'* the books called for will tend to prove as stated. *No basis for the belief is given.* The result is that if the statute requires that this application be granted it will always require that, *on a mere affidavit of belief,* each party to a suit at law may compel from the other party a general production of numerous books and papers in his possession to enable the moving party to make the attempt to sift out of them circumstances of more or less importance tending to support his position as to the issues in the action. We would thus have a result fundamentally inconsistent with all hitherto known rules, whether at law or in equity—a power given to the adverse party, or to the court, to expose and search through a mass of private transactions with the mere hope of finding therein something relevant to the cause in issue. It is impossible for us to credit that the law is so sweeping

as this, and no authority is produced to show that it is." (Pp. 417, 418.)

In Bischoffsheim vs. Brown, 29 Fed. R. 341, which was a proceeding quite similar to the present proceeding, the court (Wallace, Circuit Judge) said:

"The motion seems to have been made and has been argued upon the theory that either party to a suit in equity may call upon his adversary to exhibit for inspection anything and everything in writing under the latter's control which may assist the party who makes the call. The case of Coit vs. North Carolina Gold Amalgamating Co., 9 Fed. R. 557, is cited as an authority in this direction. Notwithstanding this authority it must be held that such practice cannot be sanctioned. Courts of equity and courts of law have always been solicitous to protect parties and witnesses against unnecessary inquisition into the contents of their private papers by those who have no interest in them, and exercise the power of assisting parties in obtaining a compulsory production of written evidence from their adversaries or from witnesses only under well established restrictions.

"In courts of equity a bill or a cross-bill alleging that the defendant has in his possession or power documents or papers relating to the matters of the bill which if produced will establish their truth is the foundation of the proceeding."

In Ryder vs. Bateman, 93 Fed. R. 31, a similar proceeding, in which it was sought to compel the plaintiffs to produce, for the inspection of the defendants, a certain deed alleged by the defendants to be a forgery and upon which the suit was based, the court (Hammond, J.) said:

"This application must be denied. It is a great mistake to suppose that parties to a litigation have a promiscuous right to the production and inspection of the papers and documents in the possession of their adversary. A loose practice has grown up on this subject and there is generally a good deal of complaisance on the part of counsel and the parties to the suit in the production of papers; but whenever the practice has been challenged, it has been found that there are limitations to the right, which it is necessary that the courts should safely guard in order to secure the citizen against an invasion of his right to hold and keep his papers from unlawful or impertinent inspection. Even litigants who expect to use their papers in evidence are not required to produce them for the information of the other side, except

under strictly guarded rules of practice that are intended to secure the protection of this right. Mr. Justice Bradley, in the case of Boyd vs. U. S. 116, U. S. 616, 6 Sup. Ct. 524, denounces the practice of invading this right under the forms of law by judicial process, and shows how it is guarded in criminal procedure by a constitutional provision; which was also enforced in the case of Potter vs. Beal, 2 C. C. A. 60, 50 Fed. R. 860, by annulling an order that had been granted for the inspection of papers in a criminal case. There is, perhaps, no constitutional provision to protect the citizen against seizures and searches in civil suits as in criminal cases, but it will be found, nevertheless, that the courts carefully avoid any unlawful violation of the citizen's right in respect of this protection. Railroad Co. vs. Botsford, 141 U. S. 250." (P. 33.)

The opinion then proceeds with an able and exhaustive review of the authorities, English and American, in support of the conclusion as stated. See also:

Lester vs. People, 150 Ill. 408;
V. J. Bloede Co. vs. Bancroft & Sons Co., 98 Fed. Rep. 175, 189.

In Boyd vs. United States, 116 U. S. 616, this court said:

"The views of the first Congress on the question of compelling a man to produce evidence against himself may be inferred from a remarkable section of the judiciary act of 1789. The 15th section of that act introduced a great improvement in the law of procedure. The substance of it is found in Sec. 724 of the Revised Statutes, and the section as originally enacted is as follows, to-wit:

"'All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default.'

"The restriction of this proceeding to 'cases and under circumstances where they' (the parties) 'might be compelled to produce the same' (books or writings) 'by the ordinary rules of proceedings in chancery,' shows the wisdom of the Congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice."

It is apparent that it was the view of the court that the power conferred by Sec. 724 upon courts of law was co-extensive with the practice prevailing in equity. By the terms of Sec. 724, as we have seen, the power of the court to compel production is limited to "the books or writings in their possession or power which contain evidence pertinent to the issue." The pertinency of the evidence contained in the documents called for being a condition of the right to their production, it would seem to follow as a corrollary that the pertinency of the evidence must first be established.

In Owhyee Land & Irrigation Co. vs. Tautphaus, decided by the circuit court of appeals for the Ninth Circuit in 109 Fed. R. 547, the court said:

"This section of the statutes plainly requires that before a party to an action at law may be held to be in default for failure to produce books or writings in his possession, there must have been an order of the court, or, in other words, that before he shall be compelled to produce such evidence under the penalty of the statute, there must first be a judgment of the court upon the question whether or not the evidence so sought is *pertinent to the issues* and ought to be produced by him to whom the order is directed. Such is the language of the statutes, and the reasons why it should be so are too apparent to require extended comment." (Citing Boyd vs. United States, Hylton's Lessee vs. Brown, 1 Wash. C. C. 298, Finch vs. Rikeman, 2 Blatchf. 302, and Triplett vs. Bank, 3 Cranch. C. C. 646.) (P. 549.)

The opinion continues:

"When we consider the cases and circumstances under which discovery may be had in equity, it is clear that the remedy afforded by the statute can only be secured upon a proper application before the court, indicating the nature of the books or writings that are sought to be produced, and

showing that the evidence to be obtained is *material to the case of the applicant,* and thereupon obtaining the judgment of the court directing its production. Brown vs. Swann, 10 Pet. 497; Bell vs. Pomeroy, 4 McLean 57; Vaughan vs. Railroad Co., 4 Sawy. 280." (P. 549.)

It is not sufficient for a party to state generally in his petition for the production of documents that they contain matters relevant to the issue in order to entitle him to their inspection, or to base his allegations in regard to their materiality upon information and belief. Facts and circumstances must be stated from which the court may determine the question of the materiality and relevancy.

The rule in relation to the compulsory production of books and papers under the New York Code is thus stated:

"The party applying must show to the satisfaction of the court the materiality and necessity of the discovery or inspection sought, the particular information which he requires, and, in the case of books and papers, that there are entries therein as to the matter of which he seeks a discovery or inspection. A discovery will not be ordered to enable a party to find out whether he has a cause of action or whether there may not be some entries or papers that will be pertinent. A prima facie case, or at least facts pointing directly to that result, must be shown before a discovery in aid thereof will be ordered. Facts and circumstances must be stated sufficient to satisfy the court that the books and papers sought to be examined do in fact contain material evidence for the party, and it is not enough that the party believes or is advised that material evidence will be found."

Walsh vs. Press Co., 48 N. Y. App. Div. 333, 335.

Particular attention is called here to the language quoted above from the case of Caspary vs. Carter, 84 Fed. R. 416.

We shall look in vain in the moving petition for allegations conforming to the rules thus laid down by the courts, and it is evident that the application is not a request for the production of specified evidence, but a request for the production of books and documents for the purpose of ascertaining whether they contain evidence. Notwithstanding anything that is stated or shown in the petition or the record, it may well turn out that the evidence contained in the books and documents called for is entirely in favor of the defendants or else wholly irrelevant. We may be permitted to quote from the celebrated opinion of

Lord Camden, which is quoted at length by this court in the case of Boyd vs. United States:

"Papers are the owner's goods and chattels. They are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye can not by the law of England be guilty of a tresspass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass and demand more considerable damages in that respect. * * * Lastly, it is urged as an argument of utility, that such a search is the means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of owner's custody by process. There is no process against papers in civil causes. It has been often tried but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, robbery and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty."

116 U. S. pp. 627, 628, 629.

The authorities which have been cited are sufficient to show the error of the opinion of the circuit judge, that the court was not required upon this hearing to pass upon the question of materiality. This is further shown by the authorities next to be cited.

b. Oral Testimony.

The doctrine which we have been endeavoring to establish is not confined to documentary evidence. It applies also to the case of oral testimony. The materiality of any question must be made to appear before a witness can be required to answer it and before he can be adjudged guilty of a contempt of court

for a refusal to answer. This rule is important when we consider the numerous questions asked of the witnesses which are not directly connected with the production of books and papers, but which they declined to answer under the advice of counsel for the reason that they were wholly irrelevant and immaterial to the plaintiff's case. Such were questions calling for the amount of dividends paid by the General Paper Company; for the amount of its annual sales; for conversations which took place between various persons prior to the organization of the General Paper Company; for conversations between a witness and a reporter of a newspaper at some subsequent occasion; calling for information in reference to a pool involving butchers' fibre, in regard to which there are no charges in the complaint, and without a hint of interstate commerce being affected by such pool; for other conversations and other matters wholly immaterial to the issues raised upon the pleadings in the principal suit.

The leading case upon this subject is In re William Judson, 3 Blatchf. 148.

"This was a motion for an attachment to compel one William Judson to answer a question put to him on his examination before a commissioner of this court, as a witness *de bene esse* under the provisions of the 30th section of the Act of Congress of September 24th, 1789 (1 U. S. Stat. at Large, 88, 89), in a suit pending in the circuit court of the United States for the district of Massachusetts. In the course of his examination the following question was propounded to the witness: 'Did you pay Chaffee any money for said assignment' (in regard to which assignment he had previously been questioned and had given testimony) 'at the time it was given, or have you paid him any since therefor, and when, and how much?' The witness declined to answer the question." (P. 149.)

"I see no reason why any more stringent obligation should be imposed upon a witness in these outside examinations than is enforced in court. Before the court will adjudge a witness to be in contempt or commit him therefor, it will require more than proof of the fact that he declines to respond to a question. It will enquire whether the question is relevant and material to the case or hearing (1 Greenl. Ev., Sec. 319); and also whether the witness is legally exempt from answering it. No contumacy can be imputed to him until these points are determined. The law gives no color to the practice, which not infrequently intrudes upon judicial proceedings, of besetting a witness with impertinent enquiries,

calculated to pry into his private affairs, or into his own character or that of other persons, or to subject him to personal liability, when the enquiries are not shown to have a legitimate bearing upon the cause on trial; and it is guarded in coercing answers to questions when their materiality is not clearly manifest. In this case, the court will not suspect any improper motive in the party pushing the enquiry which was resisted by the witness, nor, on the other hand, is it furnished with means to determine that the witness refused to answer from a refractory or contumacious disposition. It is enough to say, that the party who invokes the court to order the witness to be imprisoned until he consents to give the testimony demanded, has omitted to prove that such testimony might be relevant and material to the issue in the cause. The English Court of Exchequer refused an attachment against a witness for not attending the court upon subpœna, although the affidavits asserted that his evidence was material and necessary for the party who subpœnaed him, because of the immateriality of the evidence sought for, and also because the affidavits did not specify in what respect the evidence was material (Dicas vs. Lawson, 1 Crompt. M. & R. 934; S. C. 5 Tyrwh. 235); and an action cannot be maintained against a witness by the party who subpœnaed him for refusing to appear and testify, without proof that his testimony was material. (3 Daniell's Ch. Pr. 27)." (Pp. 150, 151.)

"My decision is placed on the ground that there is no evidence before the court that the question which the witness refused to answer had any materiality whatever to the cause, and that this court ought not to award the high writ of attachment to draw out answers to questions which may turn out to be frivolous and impertinent. There must exist a plain reason for believing that the ends of justice may be frustrated by the recusancy of a witness, unless his reply be coerced to an interrogatory, before the court will subject him to the summary and imperative process of attachment." (P. 152.)

The case of Judson was used by Judge Jenkins as authority for a very similar ruling in the case In re Allis, 44 Fed. R. 216. This was in a suit for an infringement of a patent.

"After issue joined, the testimony of William W. Allis, a resident of this district, and the secretary of the complainant, was taken by consent at his place of residence, upon oral interrogatories, and before an examiner of this court. Upon the cross-examination of the witness, and under advice and

request of counsel for the complainant company, he declined to produce certain documents and to answer a certain question; whereupon the defendant moves for an order compelling the production of the required instruments and requiring the witness to answer the interrogatory. It is objected, in opposition to the motion, that the propriety of the production of the document demanded, and the relevancy of the interrogatory propounded, can only be determined by the court in which the action is depending, and until so determined no jurisdiction is lodged with this court to act in the premises." (P. 217.)

"It is insisted that the rule contemplates that all questions must be referred, as to their relevancy, to the court having jurisdiction of the cause. Undoubtedly that court has the ultimate control of and decision upon the materiality of the examination. But it is quite another matter with respect to the compulsion of a witness to answer. In such case the court or judge exercising the power must be satisfied of the contumacy of the witness. The witness responds to the authority dominant at his residence. He is beyond the coercive power of the court entertaining the cause. His disobedience is to the mandate of the court issuing the writ of subpœna, not to the court issuing the commission. The question of disobedience involves both the materiality of the interrogatory and the privilege of the witness, and both must be considered by the court exercising jurisdiction of the witness; and this, as well for the protection of the witness as for the proper conduct of the examination." (P. 218.)

"As an incident to the power of compulsion, and by analogy to the rule obtaining with respect to depositions at law under oral interrogatories, the court or judge having jurisdiction of the witness, for the purposes of the exercise of the power of compulsion and the punishment of a refractory witness, must determine the materiality of the question declined to be answered." (P. 219.)

The same doctrine is laid down in the case of Interstate Commerce Commission vs. Brimson, 154 U. S. 447. In this case the court says as follows:

"Suffice it in the present case to say, that as the Interstate Commerce Commission by petition in a circuit court of the United States seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he

was protected by the Constitution from making answer to the questions propounded to him, or that he was not legally bound to produce the books, papers, etc., ordered to be produced, or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the commission is entitled under the Constitution or laws to investigate."

154 U. S., p. 479.

II.

THAT THE DOCUMENTARY EVIDENCE CALLED FOR WAS NOT SHOWN TO BE IN THE POSSESSION OR UNDER THE CONTROL OF THE WITNESSES.

The only ground upon which the possession or control of the books and documents called for could be said to be in the witnesses is the fact that they, or some of them, hold official positions either in the General Paper Company or in some one or more of the other defendant companies.

The witness Harmon directly states in his answer that the papers which he was required to produce are not and were not at the time he was asked to produce them in his custody or under his control, and that he then had and now has no power to produce or to compel the production of said papers. He has not since some time before his examination held any other position than that of director in any of the defendant corporations. This statement ought to be sufficient to settle the question of the power of the court to order any production of papers by said Harmon.

Each of the witnesses, Alexander, Stuart and Whiting, alleges in his answer that he is in no other manner one of the custodians of the books or papers called for than as an officer of the General Paper Company; that said books and papers are the books and papers of the General Paper Company and not of the witness and are subject to the control of the General Paper Company and not of the witness, and that the General Paper Company has objected to the production of the books and papers for inspection by counsel for complainant for the purpose of being offered in evidence in the cause.

Further, it is constantly made to appear from the record of the proceedings before the examiner, that the record books and papers of the General Paper Company, at the time of the examination and before, were in the general charge and actual possession of counsel for the General Paper Company, who, as the

representative of the company, was charged with the control of such books and papers and with the responsibility of permitting their production and inspection or use on the hearing or refusing such permission. (Pp. 148, 150, 153, 154, 155, 171, 174, 187, 206, 214, 230, 261, 262, 263, 276, 290, 294, 299 of transcript in Nos. 381, 382, 383 and 384.)

It is plain, therefore, that the defendant corporations had retained the possession and control of the books and papers called for, and are here asserting their rights as parties to deny to the complainant the right of inspection or use as evidence as the record stands, without further proof than has yet been offered of the materiality of the evidence which they may contain without a further consideration by the court of the justice of the claim of the defendants that they are privileged from producing evidence of an incriminating character.

III.

THAT THE EVIDENCE, DOCUMENTARY AND ORAL, REQUIRED TO BE PRODUCED, IF MATERIAL TO PLAINTIFF'S CASE, IS IN THE NATURE OF INCRIMINATING EVIDENCE WHICH THE WITNESSES AND THE DEFENDANTS ARE PRIVILEGED FROM FURNISHING TO THE PLAINTIFF UNDER THE PROVISIONS OF THE FEDERAL CONSTITUTION AND THE WELL RECOGNIZED PRINCIPLES OF EQUITY PROCEDURE.

The Anti-Trust Act of July 2d, 1890, contains the following provisions:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said pnishments in the discretion of the court.

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars

or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

"Section 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited."

3 Comp. Stats. pp. 3200, 3201.

The privilege against self-incrimination is claimed under the provisions of the fourth and fifth amendments to the Federal Constitution, which are as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause and supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

There is no doubt of the criminal character of the act of 1890, above quoted, or that the penalties prescribed by it would sustain the claim of privilege on the part of all the appellants from furnishing testimony against themselves in this proceeding if it were not for a provision contained in the Act of February 25, 1903, making appropriations for the year ending June 30, 1904. At the end of a long bill containing the general legislative, executive and judicial appropriations for the year ending June 30, 1904, is an appropriation of $500,000.00 for the enforcement of the Interstate Commerce Act, the Anti-Trust Act and one other act relating to revenue,

"to be expended under the direction of the attorney general in the employment of special counsel and agents of the Departmnt of Justice to conduct proceedings, suits and prosecutions under said acts in the courts of the United States;

"Provded, that no person shall be prosecuted or be subjected to any penalty or forfeture for or on account of any transaction, matter or thing concerning which he may testify

or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts;

"Provided, further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

Comp. Stats. Supplement 1903, pp. 366, 367.

The first of these provisions, it is contended, is a complete protection to the witnesses testifying in prosecutions under the acts therein referred to against all liability to penalties or forfeitures on account of any matters concerning which they may testify, and consequently destroys any claim of privilege which might otherwise be asserted.

The appellants contend that the scope of the inquisition to which they are subjected by the orders appealed from is much broader than the immunity clause, and tends to subject them to penalties and forfeitures against which the immunity clause has no effect to relieve them.

A

The discovery which by the orders appealed from the witnesses are required to make, might tend to subject them to penalties and forfeitures under the laws of the state of Wisconsin.

The Wisconsin Statutes (revision of 1898) provide as follows:

"Section 1747e. Every contract or combination in the nature of a trust or conspiracy in restraint of trade is hereby declared illegal. Every person who shall combine or conspire with any other person to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than fifty dollars nor more than three thousand dollars. Any such person shall also be liable to any person transacting or doing business in this state for all damages he may sustain by reason of the doing of anything forbidden by this section.

"Section 1747h. The word 'person' wherever used in the three next preceding sections shall be deemed to include, besides individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States, any of the territories of [or] this or any other state or of any foreign country."

These statutes, it will be observed, are substantially the same in relation to commerce within the state as the Act of Congress

in relation to combinations in restraint of interstate commerce. The questions which the witnesses are required to answer are not limited in their scope to matters of interstate commerce, but call for disclosures generally regarding the purpose of the organization of the General Paper Company, the minutes of the meetings of its board of directors, and the plans and operations of the General Paper Company in its relation with the other defendants. *The combination charged in the bill of complaint and which the questions seek to establish, include by express allegation sales within the state of Wisconsin, where all but a few of the defendants' mills are located, and is quite as much a combination in restraint of commerce within the state as it is a combination in restraint of interstate commerce.* It is conceivable that the evidence called for might disclose agreements and combinations relating solely to trade and commerce within the state. At any rate it is clear that if any combination exists, it is not limited in its scope to interstate commerce.

The latitude allowed a witness to decline to answer questions which might or might not have a tendency to incriminate, is thus stated by this court in Counselman vs. Hitchcock, 142 U. S., 547, at page 565, in the language of Chief Justice Marshall in an early case:

"If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath, that his answer would criminate himself, the court can demand no other testimony of the fact. * * * According to their statement (the counsel for the United States), a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself, as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed

to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws'." (Pages 565, 566.)

The right of a party to decline to answer, in a suit in the Federal Court, as to matters which might subject him to penalties under the state law, was affirmed by this court at an early date

United States vs. Saline Bank of Virginia, et al., 1 Pet., 100.

In that case the plaintiffs, as creditors of an unincorporated bank, filed a bill against the cashier, and a number of persons, stockholders of the bank, for a discovery and relief; who, in reply to the bill, state that their answers to the bill would subject them to penalties under the laws of Virginia, prohibiting unincorporated banks. The opinion of the court, delivered by Mr. Chief Justice Marshall, is as follows:

"This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia.

The court below decided in favor of the validity of the plea, and dismissed the bill.

It is apparent that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it." (P. 104.)

The state statutes are aimed at combinations in restraint of trade within the jurisdiction of the state. A combination having reference solely to interstate trade, probably would not be within the jurisdiction of the state legislature; but it will hardly be contended that a combination comprehending within the scope of its operation both state and interstate trade, would not be amenable to state authority so far as it affected trade within the state; and certainly a combination limited in its scope and operation to trade within the state would be subject to the jurisdiction of the state alone.

It is submitted that it is not within the province of congress to suspend the operation of these state statutes or to interfere with their enforcement in their relation to trade within the state, and therefore the immunity clause would be ineffectual to relieve the appellants against liability under the state law.

The jurisdiction of state authority over trade within the state is as exclusive and unqualified as the jurisdiction of Congress over trade between the states.

Addyston Pipe Co. vs. United States, 175 U. S., 211 (where injunction previously issued was modified to make it conform to this rule.)

Allen vs. Pullman Co., 191 U. S., 171.

National Cotton Oil Co. vs. Texas, 197 U. S., 115.

Suppose the answers of the witnesses should disclose a combination in restrain of trade, limited in its scope and operation strictly to trade within the state, Congress would have no power to punish such a combination or to legislate in respect to it. If the immunity clause in question is operative on state authority and the directors, officers and responsible agents have testified, the state would have no power to punish. So the combination would henceforth be immune from either state or federal discipline.

It may be freely admitted that the regulation of interstate commerce being one of the matters committed to Congress by the constitution, Congress may make "all laws which shall be necessary and proper for carrying into execution" such power of regulation. Such is, in effect, the express language of the constitution. But this language implies a limitation. A measure to be justified under this incidental power must not only be necessary in the sense that it has a reasonable adaptation to the end of executing some express power, but it must be proper in the sense that it does not run counter to the general policy and spirit of the constitution. Nothing is more fundamental, under our system of government, than the division of powers between the federal and state governments. However supreme the federal government may be within the sphere of its delegated powers, it can exercise no power which has not been delegated. There are many essential powers of government which are left to the states, and which, if not exercised by them, cannot be exercised at all. It would seem, therefore, absolutely necessary to the completeness and adequacy of our system of government that the reserve powers of the states which Congress itself cannot exercise or supply should not be suspended in the exercise by the general government of its delegated powrs. It must be

admitted that the primary purpose of the constitution was to form, in conjunction with the powers reserved to the states, a complete system of government for the protection of life and property within the states, as well as "a more perfect Union." It being undeniably true that there are certain functions of government which Congress has no power to exercise, as, for example, the ordinary protection of life and property within the states,—it must follow that it has no power to suspend the operations of such governmental functions by the states themselves. In other words, Congress should not have the power to take away from the states the protection or governmental rights which it has no power to give. If it be granted that Congress may suspend the operation of the criminal laws of the state, in respect of purely intra-state commerce as a means to the end of enforcing its regulations of interstate commerce, it may suspend the operation of any state law whatever in relation to crime,—as for example, by offering general immunity to persons guilty of crime, who may give testimony or aid in any way in the enforcement of the interstate regulation.

In assuming this position it is not necessary to take the ground that Congress could not, in any case, enact a law as the means of carrying into effect its express powers, which in its operation would have the effect to suspend the operation of state laws in respect of purely domestic matters. But it is insisted that such suspension of state authority can only be justified on the ground of some necessity which justified the suspension of the normal relations between the state and federal authority,—as for example, the exercise of the war power.

It is unnecessary to review or even allude to the decisions of this court which are the great landmarks of constitutional construction on the division of powers between the state and federal governments; and for us to undertake to rephrase the arguments contained in those decisions would be, in the language of one of the greatest of them, "to hold a lighted taper to the sun."

McCullough vs. Maryland, 4 Wheaton at p. 419.

The necessary independence of the state courts of federal authority, within their appropriate spheres of action, is well stated in Craig vs. Dimock, 47 Ill., 308. The question before the court was where the clause in the act of Congress of June 30th, 1864, providing that unstamped documents should not be receivable in evidence, was applicable to the state courts. It was held that this clause did not apply to the state courts. In the opinion the court said:

"The object of this act and of all other acts of Congress of like nature, is to raise money to support the government, and pay its debts, and for this purpose, vast powers were granted by the states in framing the constitution of the United States, to the Congress established by it; but the powers not so delegated to the United States by the constitution, nor prohibited by it to the states, were reserved to the states respectively, or to the people.

While, then, the power to levy taxes for the purposes indicated in the constitution may be admitted, it cannot be admitted, it can be so exercised as to take from the domain of state legislation, all such subjects as are properly confided to it, and the care of which has not been surrendered to the Congress by the states. * * *

We do not think it requires any argument to prove, that Congress, under the constitution, has no such power, and under the pretense of levying taxes, cannot so direct that power as to enter into our state courts and take from them the powers with which the state laws have vested them.

It is eloquently remarked by Chancellor Kent that, 'The vast field of the law of property, the very extensive head of equity jurisdiction, and the principal rights and duties which flow from our civil and domestic relations, fall within the control, and we might almost say the exclusive cognizance of the state governments. We look essentially to the state courts for protection to all these momentous interests.' 1 Kent's Com., 483. To hold that Congress in the exercise of the taxing power, can enter into these courts, and prescribe what shall be evidence therein, is so revolting to all our notions of federal and state power as to compel us to refuse to yield any acquiescence in such a doctrine. By admitting it, the power and sovereignty of the states over legitimate subjects of state power and sovereignty, are at once annihilated." (Pp. 312, 313, 316.)

In Collector vs. Day, 11 Wall., 113, the question was as to the right of Congress under the constitution of the United States, to impose a tax upon the salary of a judicial officer of a state. The right was denied. In the opinion, Justice Nelson, speaking for the court, said:

"It is a familiar rule of construction of the constitution "of the Union, that the sovereign powers vested in the state "governments by their respective constitutions, remained un-"altered and unimpaired, except so far as they were granted "to the government of the United States. That the intention

"of the framers of the constitution in this respect might not "be misunderstood, this rule of interpretation is expressly "declared in the tenth article of the amendments, namely, " 'The powers not delegated to the United States are reserved "to the states respectively, or to the people.' The government "of the United States, therefore, can claim no powers which "are not granted to it by the constitution, and the powers "actually granted must be such as are expressly given, or "given by necessary implication.

"The general government, and the states, although both "exist within the same territorial limits, are separate and dis- "tinct sovereignties, acting separately and independently of "each other, wthin their respective spheres. The former in "its appropriate sphere is supreme; but the states within "the limits of their powers not granted, or, in the language "of the tenth amendment, 'reserved,' are as independent of "the general government as that government within its sphere "is independent of the states.

"The relations existing between the two governments are "well stated by the present Chief Justice in the case of Lane "County vs. Oregon, 7 Wall., 76. 'Both the states and the "United States,' he observed, 'existed before the constitution. "The people, through that instrument, established a more per- "fect union, by substituting a national government, acting with ample powers directly upon the citizens, instead of the "confederate government, which acted with powers greatly re- "stricted, only upon the states. But, in many of the articles "of the constitution, the necessary existence of the states, and "within their proper spheres, the independent authority of "the states, are distinctly recognized. To them nearly the "whole charge of interior regulation is committed or left; to "them, and to the people, all powers, not expressly delegated "to the national government, are reserved.' Upon looking "into the constitution it will be found that but a few of the "articles in that instrument could be carried into practical "effect without the existence of the states.

"Two of the great departments of the government, the ex- "ecutive and legislative, depend upon the exercise of the pow- "ers, or upon the people of the states. The constitution guar- "antees to the states a republican form of government, and "protects each against invasion or domestic violence. Such "being the separate and independent condition of the states "in our complex system, as recognized by the constitution, "and the existence of which is so indispensable, that, without "them, the general government itself would disappear from

"the family of nations, it would seem to follow, as a reason-
"able, if not a necessary consequence, that the means and in-
"strumentalities employed for carrying on the operations of
"their governments, for preserving their existence, and ful-
"filling the high and responsible duties assigned to them in
"the constitution, should be left free and unimpaired, should
"not be liable to be crippled, much less defeated by the tax-
"ing power of another government, which power acknowl-
"edges no limits but the will of the legislative body imposing
"the tax. And, more especially, those means and instrumen-
"talities which are the creation of their sovereign and re-
"served rights, one of which is the establishment of the judi-
"cial department, and the appointment of officers to admin-
"ister their laws. Without this power and the exercise of it,
"we risk nothing in saying that no one of the states under the
"form of government guaranteed by the constitution could
"long preserve its existence. A despotic government might.
"We have said that one of the reserved powers was to estab-
"lish a judicial department; it would have been more accur-
"ate and in accordance with the existing state of things at
"the time, to have said the power to maintain a judicial de-
"partment. All of the thirteen states were in possession of
"this power, and had exercised it at the adoption of the con-
"stitution; and it is not pretended that any grant of it to the
"general government is found in that instrument. It is,
"therefore, one of the sovereign powers vested in the states by
"their constitutions, which remained unaltered and unim-
"paired, and in respect to which the state is as independent of
"the general government as that government is independent
"of the states.

"The supremacy of the general government, therefore, so
"much relied on in the argument of the counsel for the
"plaintiff in error, in respect to the question before us, cannot
"be maintained. The two governments are upon an equality
"and the question is whether the power 'to lay and collect
"taxes' enables the general government to tax the salary of a
"judicial officer of the state, which officer is a means or in-
"strumentality employed to carry into execution one of its
"most important functions, the administration of the laws,
"and which concerns the exercise of a right reserved to the
"states?" (Pp. 124-126.)

The same principle of constitutional construction, which would prohibit the federal government from interfering with the regulation by the states, of their domestic concerns, under

whatever guise, is recognized by Mr. Chief Justice Marshall in McCulloch vs. State of Maryland, supra, as follows:

"If we measure the power of taxation residing in a state, "by the extent of sovereignty which the people of a single state "possess, and can confer on its government, we have an in- "telligible standard, applicable to every case to which the "power may be applied. We have a principle which leaves "the power of taxing the people and property of a state un- "impaired; which leaves to a state the command of all its re- "sources, and which places beyond its reach, all those powers "which are conferred by the people of the United States on "the government of the Union, and all those means which are "given for the purpose of carrying those powers into execu- "tion. We have a principle which is safe for the states, and "safe for the Union. We are relieved, as we ought to be, from "clashing sovereignty; from interfering powers; from a re- "pugnancy between a right in one government to pull down "what there is an acknowledged right in another to build up; "from the incompatibility of a right in one government to "destroy what there is a right in another to preserve." (Pp. 429, 430.)

The immunity clause in question either extends to all crimes against the state, which may be disclosed by the witness in proceedings under the act, or it does not extend to any of them. Suppose it should develop that the plans of a combination proceeded against, included a plot to put to death all parties in the same line of business, who should hold out and refuse to come into the combination, or a plot to bribe legislatures and courts, or to buy up votes at elections, and that such plots had in fact been carried into execution by the actual consummation of the guilty design within the limits of a single state. It would hardly be contended that the parties to the crime would be immune from punishment by the state, because the evidence of the crime was disclosed by them in proceedings under the anti-trust act. Why? Because the crime is one which would fall exclusively within the jurisdiction of the state courts and not within the purview of the immunity clause, which must be assumed to relate only to matters over which the jurisdiction of Congress extends. By the same reasoning, doubtless, it would not be held to apply to any matters within the jurisdiction of the state courts.

It is the settled law of this court that the Fifth Amendment has no application to state courts and their proceedings under state laws.

Barron vs. Mayor of Baltimore, 7 Pet., 243.
Withers vs. Buckley, 20 How., 84.
Pumpelley vs. Green Bay Co., 13 Wall., 166.
Eilenbecker vs. District Court of Plymouth County, 134 U. S., 31.

If the state courts are so far independent in their proceedings to punish crime against the state, that they are not bound by the constitutional amendment itself, how can it be said that they are bound by the immunity clause in question, the obvious purpose of which was to avoid the effect of the amendment? As Congress cannot create or punish crimes against the state, it should not have the power to forgive them when created, or to interfere with their punishment, by the state.

If it be granted that it was within the conceivable powers of Congress in the circumstances under which the immunity clause was enacted, to make it generally applicable to state as well as to federal courts, it cannot be said, under a fair construction of the clause, that Congress intended to exercise such extreme power. Being in the nature of an exception to a rule of liability, it should be strictly construed.

Sutherland on Statutory Construction, Sec. 223.
United States vs. Dickson, 15 Pet., 141.
Epps vs. Epps, 17 Ill. App., 196.

The clause in question is contained in the Appropriation Act for the enforcement of three specific acts, all of which contain criminal or penal provisions. A fair construction of the immunity contemplated by this clause would limit it to the penalties and forfeitures provided for in the three acts to which it relates, and certainly a strict construction would so limit it. It is only by the most latitudinarian construction that it can be extended to matters generally cognizable in the state as well as the federal courts. Such a construction, if it does not exceed, certainly stretches to the uttermost limits the conceivable powers of Congress under its interstate commerce jurisdiction. Under well recognized principles of interpretation, a construction of a statute which raises doubts as to its validity and calls in question the power of the legislature to enact it, is to be avoided, if possible.

The view that the clause is confined, in its operation and effect to grant immunity, to the penalties provided for in the several acts to which it relates, finds support in

United States vs. Price, 96 Fed. Rep., 960.

In that case, referring to the immunity clause contained in the interstate commerce act, it was held that:

"The amnesty given to the witness is limited to the matters to which he is compelled to testify, and extends only to 'a cause or proceeding based upon or growing out of an alleged violation' of the said act to regulate commerce, and that as to other matters regarding which he may be interrogated as a witness he is left, first, to his privilege of refusing to answer lest he may criminate himself, or, second, if he answers, then to his rights under Rev. St., Sec. 860, supplemented by the further provisions of the act of 1893, prohibiting the use of his testimony against him."

THE CASE OF BROWN VS. WALKER, MUCH RELIED UPON IN THE COURT BELOW, IS NOT PROPERLY APPLICABLE TO THE FACTS OF THE PRESENT CASE.

It was contended in the court below, and doubtless will be argued here, that the case of Brown vs. Walker, 161 U. S., 591, is decisive authority for the proposition that the immunity clause in the Appropriation Act of 1903 is binding upon the state as well as on the federal courts, and operates as a complete protection to the witnesses from any penalty or prosecutions whatever in relation to any matter, transaction or thing concerning which they may testify. But as we understand that decision, it does not go to any such extreme. True, there is some general language in the opinion, which considered apart from the facts before the court and given general application, would seem to justify such contention. But it is not the rule to give to the general language of an opinion such sweeping and universal application. In the language of this court in another case: "The opinion of a court must always be read in connection with the facts upon which it is based."

Doyle vs. Continental Insurance Co., 94 U. S., 538.

The language of the opinion in Brown vs. Walker, upon which the argument for such sweeping application of the clause in question is based, is found on page 606 et seq. of the report, commencing as follows:

"It is argued in this connection that, while the witness is granted immunity from prosecution by the federal government, he does not obtain such immunity against prosecution in the state courts. We are unable to appreciate the force of this suggestion. It is true that the constitution does not operate upon a witness testifying in the state courts, since

we have held that the first eight amendments are limitaions only upon the power of Congress and the federal courts, and are not applicable to the several states, except so far as the Fourteenth Amendment may have made them applicable." (Citing cases.)

"There is no such restriction, however, upon the applicability of federal statutes. The sixth article of the constitution declares that 'This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding'."

The court was unquestionably there speaking of the operation and effect of federal statutes within the clear scope of the power and authority of Congress to legislate. The matter immediately under discussion was the application of the immunity clause in the amendment of the interstate commerce act to the facts of the case before the court. The facts were that a witness in an investigation by the interstate commerce commission had been asked certain questions relating exclusively to interstate commerce, in respect of which it may be freely admitted the authority of the federal government is exclusive and supreme. The question the court was called upon to decide was whether the answers to the particular questions in that case relating as they did exclusively to interstate commerce, could be made the basis of prosecution in the state courts, in the face of the immunity clause contained in the interstate commerce act as an incident of the regulation by Congress of interstate commerce. As applied to the facts of the particular case it was simply a question of the paramount authority of Congress over interstate commerce. That the exclusive authority of Congress over the subject-matter to which the question related, was the real ground of the decision upon this point, is made evident by a paragraph in one of the dissenting opinions, as follows:

"It is said that the constitutional protection is solely against prosecutions of the government that grants it, and that, in this case, the questions asked the witness related exclusively to matters of interstate commerce, in respect of which there can be but one sovereign; that his refusal to answer related to his fear of punishment by that sovereign, and to nothing else; and that no answer the witness could make

could possibly tend to criminate him under the laws of any other government, be it foreign or state." (Page 626.)

The distinguishing feature in this regard, between the case of Brown vs. Walker and the present case, is that here the questions asked the witnesses do not necessarily relate to interstate commerce at all, but, as before stated, they are a general inquisition into the nature of the trade relations existing between the General Paper Company and the other defendants. The General Paper Company, which, according to the petition is the keystone of the alleged conspiracy, organized for the express purposes thereof, is a Wisconsin corporation; all but two of the other twenty-three defendants are Wisconsin corporations. It may be presumed that some, at least, of the alleged agreements and understandings constituting the so-called conspiracy, if made and entered into, had their inception within the state, and if the complex and many-sided combination charged in the complaint exists, it is fair to presume that its locus is within the state and that much of the trade over which its control and arbitrary powers are exercised, is strictly within the state.

The decision in Brown vs. Walker may be fairly summarized as follows:

1. That Brown, the appellant, as auditor of the Alleghany Valley Railway Company, could not be said to have committed any criminal act even under the Interstate Commerce Law. No state law was either involved or suggested which he could be considered to have violated, except that in a dissenting opinion the crimes of embezzlement and of making false entries are used as possible illustrations.

2. That whether or not a crime had been committed by Brown against the laws of the state of Pennsylvania, the immunity clause of the Interstate Commerce Acts would probably be effectual to prevent prosecution under state laws.

3. That whether or not such effect could be given to the immunity clause was a question not material to the decision in that case, in view of the imaginary and unsubstantial character of the danger of state prosecution to which the appellant was exposed.

That the case of Brown vs. Walker was not understood by the court as definitely deciding the question as to whether or not the immunity clause of the interstate commerce acts applied to prevent prosecutions under state laws, is indicated by a reference to the decision in a later case. In Jack vs. The State of Kansas, recently reported, this court, referring to the case of Brown vs. Walker said:

"In that case it was contended on the part of the witness that the statute did not grant him immunity against prosecutions in the state courts, although it granted him full immunity from prosecution by the federal government. The contention was held to be without merit. While it was asserted that the law of Congress was supreme and the judges and courts in every state were bound thereby, and that therefore the statute granting immunity would *probably* operate in the state as well as in the federal courts, yet still and aside from that view it was said that while there might be a bare possibility that the witness might be subjected to the criminal laws of some other sovereignty, it was not a real and probable danger but was so improbable that it needed not to be taken into account." (The italics are ours.)

Again, it was contended below, in line with the suggestion in Jack vs. Kansas, that under the authority of Brown vs. Walker the protection of the Fifth Amendment does not extend to liability to penalties under state laws, however palpable such liability may be, and consequently it is immaterial whether the immunity clause extends to such penalties or not.

The language of the opinion in Brown vs. Walker, which gave rise to this remarkable contention, was the following:

"But even granting that there were still a bare possibility that by his disclosures he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in Queen vs. Boyes, 1 B. & S., 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate." (Page 608.)

It does not appear, in the report of the case, that any specific state law, making the matters in reference to which the questions were propounded, criminal, was pointed out or suggested to the court. The question of possible liability under a state law seems to have been raised and considered merely as a possibility, in the absence of evidence of any such liability. In the present case it is pointed out that there are statutes in the state, in which the suit is pending, making the identical matters to

which the questions relate, criminal under the state law, and the witnesses expressly claim their privilege on account of their liability thereto.

If further argument were needed to suggest a real danger to the witnesses of prosecution under state authority as distinguished from "danger of an imaginary and unsubstantial character having reference to some extreme and barely possible contingency so improbable that no reasonable man would suffer it to influence his conduct," it may be suggested in view of the number of the parties, the nature of the subject matter and the widespread interests affected, including that of the public press, that the widest publicity will be given to the evidence disclosed, and there will be no lack of private interest to incite public action.

"Ordinary operations of the law" include state as well as federal laws. The English Constitution and the protection which it gives to witnesses cover all the law which is administered in England. In proof of this we quote from Daniell's Chancery Practice the following:

> "Where the forfeiture or penalty is not of such a nature that the plaintiff can, by waiver, relieve the defendant from the consequence of his discovery, a demurrer will hold; for it is a general rule that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of that punishment: whether it arises *by the Ecclesiastical Law, or by the law of the land.* This rule is not confined to cases in which the discovery must necessarily subject the defendant to pains and penalties, but it extends to cases where it may do so."
>
> 1 Daniell's Ch. Pr. 5 Am. Ed., *p. 563.

As showing what is meant by the above reference to punishment under the Ecclesiastical Law, we quote the following from a standard work on criminal law:

> "Now, there are criminal offenses cognizable, in England, by the ecclesiastical judges; yet not criminal in precisely the sense of the general common law, but rather as injuring the souls of men. The punishment is ordinarily to pay the costs of prosecution, and do penance; the usual penance being to make confession in the vestry of the church, unless the judge will consent to receive in commutation, 'an oblation of a sum of money for pious uses,' or unless the penalty is remitted on account of ill health, or for some other cause. But obviously, in the absence both of ecclesiastical courts and an

established religion, these offenses and punishments do not exist in this country."

1 Bishop on Criminal Law, Sec. 38.

What is here said about the ecclesiastical law and matters coming within its condemnation and punishment proves that the privilege against self-incrimination in England covers all the law there is; for as both Daniell and Bishop proceed to show, the penalties administered by the ecclesiastical courts were imposed in cases not criminal under the common law of England.

The only exception given by the English rule in any degree analogous to that which would exclude the criminal laws of the states from the operation of the constitutional amendment is that "a defendant cannot refuse to give testimony on the ground that it will expose him to penalties in a foreign country." 1 Daniell's Ch. Pl. & Pr., 5 Am Ed., *p. 567.

Very learned and instructive discussions of the constitutional law as it existed in England and, by transfer, in the American colonies at the time of the adoption of our federal constitution, are to be found in many decisions both in the United States and State reports. None are more learned or more instructive than those in the cases of Boyd vs. United States, Counselman vs. Hitchcock and Brown vs. Walker. It would be superfluous to quote from these, but it is considered that they fully justify the position taken here by the appellants.

At the time of the adoption of the federal constitution the privilege against self-incrimination was a part of the fundamental law of every state, not always expressed in the form of a written constitution, but always recognized as implicitly as though expressed. Before the adoption of the federal constitution this privilege in every state extended to and included every kind of law which was administered within such state. It bound every court and protected every party and witness. After the adoption of the federal constitution and the organization of the national government under it the apprehension began to manifest itself among the people that this and other guarantees of personal liberty might not be regerdad as controlling upon the national government. It is true that the first Congress in its judiciary act declared that "the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." This was section 34 of the

judiciary act of 1789, and has since been incorporated into the compiled statutes as section 721. And it is true that under this provision the courts have held that the laws of the several states upon the subject of competency and privilege of witnesses, except where otherwise required or provided by congress, furnish the rules of decision in trials at common law in the courts of the United States; and under the maxim that "Equity follows the law," the same rules are, for the most part, in effect made operative in proceedings in equity suits in the United States courts. It might have been said that section 721 of the Compiled Statutes was sufficient to establish in the federal tribunals the rule of privilege against self-incrimination which prevailed in the state tribunals; but it was realized that what Congress had the power to enact, it had the power to change, and there was no disposition to leave this privilege subject to change in that way. The force of this feeling was realized among the members of the first Congress and the same congress which enacted the judiciary act proposed for adoption by the people of the United States the first ten amendments to the federal constitution.

Now it is said, and truly, that these amendments are operative only upon the federal government and the federal courts; but this does not change the fact that the intention of these amendments was to establish in the administration of national laws and in the administration of justice in the national courts, *not different, but the same* principles which were, apart from these amendments and independently of them, established in the courts of the several states.

The federal government and the federal courts are not now, nor were they then, regarded as a foreign government or foreign courts, and in the exercise of their jurisdiction the courts of the United States have uniformly held that the state governments and the state courts are in no sense to be regarded as foreign to them. The law administered within a state, whether by state courts or by federal courts, and whether enacted by state or national legislature, is the law of that state, binding upon all of its citizens and upon all of its governmental agencies. This principle has been so often stated and upheld by the decisions of this and other courts that it will be sufficent to cite a few of the authorities without quotation from their decisions.

Metcalf vs. Watertown, 153 U. S., 671.
Emery vs. Palmer, 107 U. S., 3.
Ballin vs. Friend Lace Imp. Co., 78 Wis., 404.
Turrell vs. Warren, 25 Minn., 9.
Barney vs. Patterson, 6 Harr. & J., 182.

Thomson vs. Lee County, 22 Ia., 206.
Wandling vs. Straw, 25 W. Va., 705.
St. Albans vs. Bush, 4 Vt., 58.
Macauley vs. Hargroves, 48 Ga., 50.
Williams vs. Wilkes, 14 Pa., 228.

It is apparent, therefore, that the rule, or exception to the rule, relating to the criminal laws of foreign states, is not applicable to the relations between the states and the national government.

It is significant that in the case already cited of United States vs. Saline Bank of Virginia, 1 Pet., 100, where the privilege against self-incrimination was claimed with reference to the criminal laws of Virginia, the decision of the court, the case being one in equity, was not expressly based upon any constitutional provision. The language is:

> "It is apparent that in every step of the suit the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it."

It is impossible to say in reading this decision whether it was based upon the Virginia constitution or upon that of the United States. It is apparently based upon that old equity rule which is the foundation of both and which, it cannot be doubted, is the same under either, and in the courts of either jurisdiction.

Suppose in the same suit, which was one between private parties and relating to civil rights, the privilege had been claimed by way of protection against some penal act of congress: Would not the ruling have been the same? It certainly must have been. But under which constitutional provision, that of the state or that of the United States? Under the provisions of the judiciary act, the law of the state furnished a rule of decision. Under the constitutional amendments the same rule would have been applied. *It cannot be doubted that whether in the federal courts or in the state courts the rule is the same, not different, and equally protects from the danger of self-incrimination persons who may be liable to penalties under state laws and persons who may be liable to penalties under federal laws.* It is difficult to find a justification for any other doctrine.

In Brown vs. Walker the court said:

> "As the object of the first eight amendments to the constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become

permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations which should be put upon them."

161 U. S., 600.

That is to say that the provisions of these amendments are merely the enactment into a constitutional form of the equity and common law rules of evidence and procedure which had become crystalized into an Anglo-Saxon rule of liberty both in the mother country and in the colonies before the adoption of our constitution. The constitutional provision, under the liberal rules laid down by this court for its interpretation, is at least as broad, therefore, as the common law and equity rule of which it is the embodiment.

It was firmly settled under the rules of common law and equity procedure at the time the constitution was adopted that *no person could be compelled to discover any fact, either by producing documents or answering questions, which might subject him either directly or eventually to liability to a penalty or forfeiture, or anything in the nature of a penalty or forfeiture.*

1 Daniell's Chancery Pleading & Practice, 5th Am. Ed., *pp. 562, 563.
2d Story's Equity Jurisprudence, Sec. 1494.
Pomeroy's Equity Jurisprudence, Vol. 1, 202.
Livingston vs. Harris, 3 Paige, 527; affirmed in 11 Wend. 329.
Northrop vs. Hatch, 6 Conn., 361, 363.
Livingston vs. Tompkins, 4 Johnson's Ch. at p. 432 and cases there cited.
Vanderveer vs. Holcomb, 17 N. J. Eq., 91.
Higdon vs. Heard, 14 Ga., 255.
State vs. Talbott, 73 Mo., 347.
Poindexter vs. Davis, 6 Grattan (Va.), 481.
Re. Kip, 1 Paige, 601.
United States vs. National Lead Co., 75 Fed. R., 94.
Newgold vs. American Electrical, Etc., Co., 108 Fed. R., 341.
United States vs. Boyd, 116 U. S., at p. 631.

The doctrine which may be taken as the consensus of the authorities is well stated in Livingston vs. Harris, supra. That was a suit to compel the defendant to deliver up a usurious note for cancellation and to enjoin proceedings thereon at law. As

to the right of the plaintiff to elicit from the defendant discovery of evidence regarding the usury, the chancellor (Wallworth) said:

"If a discovery was necessary, either to aid him in a defense at law or otherwise, he was also met by another settled principle of this court that it will not extort from the defendant an answer on oath and thus compel him to be a witness against himself, where such answer might subject him to a criminal proceeding or to a penalty or forfeiture or to any loss in the nature of a forfeiture."

"In accordance with these two principles it had become the settled law of the court of chancery, previous to the adoption of the revised statutes, that a defendant was not bound to answer a bill seeking a discovery as to any usurious transaction, where a disclosure of the usury would or might subject him to the forfeiture or loss of the whole or any part of the money actually lent or of the legal interest therein. * * * The constitution, however, has wisely provided that a party shall not be compelled, in a criminal case, to be a witness against himself, and this principle by the common law was extended to proceedings in civil cases where the witness was called upon to make a disclosure which might subject himself to a forfeiture of penalty or to any loss in the nature of a penalty. It would therefore be inconsistent with this principle of the common law and with the spirit of the constitution to compel a defendant to be a witness against himself where the effect of the disclosure which he was required to make would be to subject him to the forfeiture of money actually loaned and to which no other person had any equitable claim." (3 Paige at p. 533.)

In Livingston vs. Tompkins, 4 John. Ch. at page 432, the following language is used by Chancellor Kent:

"There are numerous cases establishing the rule that no one is bound to answer so as to subject himself either directly or eventually to a forfeiture or penalty, or anything in the nature of a forfeiture or penalty." (Citing numerous cases.)

The rule extends to protect a witness who is not a party, as well as to the protection of a party.

Thus in United States vs. Boyd, 116 U. S., at page 638, it is said:

"A witness as well as a party is protected by the law from being compelled to give evidence that tends to criminate him or to subject his property to forfeiture." Citing Queen vs. Newell, Parker, 269; 1 Greenl. on Evidence, Secs. 451-453.

The cases make no distinction between the right to refuse to

discover the facts in the pleadings or to testify to them upon the trial. Obviously, if the complainant is not entitled to have discovery as to a matter by the written answer of the defendant, the same rule must protect the defedant from being required to testify to the fact on the trial. Thus, in Henry vs. The Bank of Selina, 1 N. Y. (1 Comstock) 83, it was held (quoting the head note):

"A witness or a party called as a witness may not only object to testifying to the main fact which would subject him to a penalty or forfeiture, but may also refuse to disclose any one of a series of facts which together would expose him to such penalty or forfeitures."

In the opinion the court said:

"The rule is well settled that a witness is not required to give any answer which will have a tendency to accuse himself of any crime or misdemeanor or to expose him to any penalty or forfeiture, or when by answering a link may be added to a chain of testimony tending to such a result."

In Counselman vs. Hitchcock (142 U. S. 547) the court said:

"This provision (the Fifth Amendment) must have a broad construction in favor of the right which it was intended to secure. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

And in Boyd vs. United States:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." (P. 635.)

We do not believe the court meant to decide, in Brown vs. Walker, or that the decision in that case fairly admits of the construction that the protection of the Fifth Amendment against

self-incrimination relates solely to matters cognizable in the federal courts. To thus limit the scope and application of the amendment would be to practically destroy its efficacy.

The criminal jurisdiction of the federal courts is limited to matters made criminal by the acts of Congress, but the great body of the criminal law, for the protection of life and property within the several states, is declared and administered by the states themselves. To say that this entire body of criminal law, including crimes at common law punishable only in the state courts, is excluded from the application of the Fifth Amendment, is practically to make the amendment a nullity. Such a narrow and ineffectual construction of the amendment is contrary to the entire current of the decisions of this court. (*Cases supra.*)

But even if it were true that the Fifth Amendment has no application to penalties which might be incurred under state laws, *the witnesses would still be privileged from discovering any matters which might tend to expose them to penalties or forfeitures, under the common law and by the well established rules and principles of equity, independent of the constitutional provision.*

Note that the immunity clause under consideration does not require the witnesses to answer regardless of whether the matters disclosed may be criminatory or not, but merely provides "that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify," etc. If therefore, the immunity clause does not extend to relieve against penalties or forfeitures which may be suffered under state laws, a witness, even if not protected against such exposure by the Fifth Amendment, may still claim the protection of the common law. In other words, the common law rule is not changed by the immunity clause, except so far as immunity is granted. If the immunity does not extend to offenses against state laws, then the common law privilege of a witness subject to those laws, to refuse to disclose matters which may subject him to penalties under them, remains unaffected.

B.

Other statutes of the state are as follows:

"Section 1791j. Corporations organized under the laws of this state are prohibited from entering into any combination, conspiracy, trust, pool, agreement or contract intended

to restrain or prevent competition in the supply or price of any article or commodity in general use in this state or constituting a subject of trade or commerce therein, or to control the price of any such article or commodity, to regulate or fix the price thereof, to limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or to fix any standard or figure by which its prices to the public shall be in any manner controlled or established."

"Section 3241. An action may be brought by the attorney general, or by any private party in the name of the state, on leave granted therefor by the Supreme Court upon cause shown, for the purpose of vacating the charter or annulling the existence of any corporation created by or under the laws of this state, except a municipal corporation, whenever such corporation shall:

"1. Offend against any of the provisions of any law by or under which it shall have been created, altered or renewed; or

"2. Violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or

"3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or

"4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges, or franchises; or

"5. Whenever it shall exercise franchises or privileges not conferred upon it by law."

"The grounds on which the franchises of corporations may be seized by the state and forfeited consists of a wilful nonfeasance or malfeasance, otherwise described as a wilful nonuser or misuser of their franchises in matters affecting the interests or right of the public generally."

5 Thompson on Corporations, Sec. 6609.

"For a corporation to combine with other corporations and form a trust, the object of which is to limit production, maintain prices and stifle competition, is such a misuser of its franchises as will entitle the state to demand a judgment ousting it of them where there is a statute prohibiting corporations from entering into such combinations."

5 Thompson on Corporations, Sec. 6627.

See also:

State vs. Easton S. & L. Club, 73 Md., 97.
State vs. Club of Neosho, 44 Mo. App., 86.

It will be the duty of the law officers of Wisconsin, under the statutes and rules of law above quoted, to proceed to forfeit the charters of the defendant corporations if the charges upon which this suit is based are proved, and manifestly the discovery of the facts which the witnesses have been ordered to disclose, if material to plaintiff's case, will tend to subject the various defendant corporations, in which the witnesses are officers and stockholders, to such forfeiture. This liability to forfeiture of charter is as to the corporations a liability to civil death,—the highest penalty the law can inflict upon them; and the forfeiture of their charters must result in the forfeiture by the witnesses of their respective offices and of their stock, which as averred in their respective answers, would involve substantial loss of property value.

The fact that the defendant corporations are engaged in interstate commerce does not remove them from the authority which may be exercised by a state over corporations which it has created: and apparently there is no power on earth which can interfere between the state and a corporation deriving its charter from the state in proceedings to take away its charter.

State vs. C. W. & B. Ry. Co., 47 O. St. 130, 137.
State ex rel vs. Doyle, 40 Wis. 175; S. C. 94 U. S. 535.

In the first of these two cases the action was one of *quo warranto* brought under the state statute of Ohio against a railway corporation engaged in interstate commerce for misuse of its franchise within the state growing out of an alleged unlawful discrimination in rates. Objection to the jurisdiction of the court was taken on the ground that the corporation was engaged in interstate commerce. It appeared in fact that some at least of the transactions complained of were matters of interstate commerce. In the decisions sustaining the jurisdiction the court said as follows:

"No doubt the regulation of interstate commerce belongs exclusively to the national government. But does the controversy now before us, in any proper sense of the term, relate to a regulation of commerce between the states? Does this exclusive right in Congress to regulate interstate commerce preclude any action by a state upon any subject that may incidentally affect such commerce? Certainly a state cannot be compelled to create corporations in aid of, or to facilitate, commerce between the states; but if it does create one capable of engaging in such commerce, and the corporation in fact so engages, is that an emancipation of the corporation from the control of the state? That the power to regulate commerce

between the states cannot safely be pressed to such extreme consequences is, we think, recognized by the Supreme Court in Robbins vs. Shelby County Taxing District, 120 U. S. 489. The corporation has received vitality from the state; it continues during its existence to be the creature of the state; must live subservient to its laws, and has such powers and franchises as those laws have bestowed upon it, and none others. As the state was not bound to create it in the first place, it is not bound to maintain it after having done so if it violates the laws or public policy of the state, or misuses its franchises to oppress the citizens thereof.

"For such offenses the state, acting through its legislature and courts, and in the exercise of a sound discretion, may either destroy the corporation entirely by forfeiting its charter or oust it from the wrongful exercise of its powers. And if, instead of or in addition to misusing the franchises actually conferred, it usurps others, the circumstances that the usurped franchises relate to and concern commerce between the states ought not to deprive the state of its visitorial power. If the state creating the corporation is deprived of this power, none exists elsewhere. 'The government creating the corporation *can alone* institute such a proceeding': (*quo warranto* to adjudge forfeiture of a corporate franchise:) 'since it may waive a broken condition of a compact made with it.' Angel & Ames on Corporations, Sec. 777, and cases cited."

C.

The liability to injunction to which it is the purpose of the suit to subject the appellants is itself a penalty, to-wit: one of the penalties prescribed by the Anti-Trust Act.

The suit in which the evidence is required is in the nature of a criminal proceeding. The illegal and criminal character of the acts against which the entire statute is directed is plainly declared by the first and second sections. The fourth section, under which the suit in question was brought, provides a method of civil procedure to enjoin the violation or the continuance of a violation of the Act; but does not purport to change the criminal character of the statute as declared in the first and second sections. On the contrary, the remedy by injunction is clearly cumulative and is merely an additional method of enforcing a statute which in every aspect is penal in its nature. As said by Mr. Justice Holmes in the case of Northern Securities Co. vs. United States, 193 U. S. 401:

"The statute of which we have to find a meaning is a criminal statute. The two sections on which the government re-

lies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction."

From this language, although occurring in a dissenting opinion, we think there can be no dissent. Indeed, the criminal nature of the proceeding was recognized by the court in the majority opinion in the case just cited. The fact that the proceeding is civel rather than criminal in form is unimportant.

In Boyd vs. United States, 116 U. S. 616, which was a proceeding civil in form to establish a forfeiture of goods under the custom laws, the court said:

"The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relations between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of Coffey vs. United States, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution and of that portion of the fifth amendment which declares that no person shall be compelled, in any criminal case, to be a witness against himself." (P. 634.)

To the same purport is the case of Lees et al. vs. United States, 150 U. S. 476. This was an action brought in the district court of the Eastern District of Pennsylvania for the recovery of $1,000.00 as a penalty for the violation of an act of Congress prohibiting the importation of aliens under contract to perform labor. One of the allegations of error was that the court compelled one of the defendants to become a witness for the government and furnish evidence against himself. In reference to this this court said:

"This, though an action civil in form, is unquestionably criminal in its nature and in such a case a defendant cannot be compelled to be a witness against himself."

The suit in question is based, not upon a threatened future violation of the statute, but upon an actual and continued violation. It is brought to enjoin a continuance of operations under an alleged combination already formed and in full operation,

distinctly alleged to be in violation of the statute. There can be no question under these circumstances that the proceeding is criminal, or quasi-criminal, in character, and that the essential allegations upon which it is based are criminal acts on the part of the defendants and their responsible officers, agents and directors.

The liability to injunction and to the proceedings prescribed by Section 4 is in the nature of an additional or cumulative penalty provided by the statute as one of the sanctions for its observance. The statute itself being punitive, every sanction which it provides to enforce its observance, is likewise punitive. Such liability to injunction depends wholly upon the statute. There was no such remedy at common law. It has no relation to any actual injury or damage threatened to or which may be sustained by any individual or private interest, but is a liability imposed by statute on the grounds of public policy. It is, therefore, punitive and penal in its nature.

Merchants' Bank vs. Bliss, 35 N. Y. 412, 416.

Each of the witnesses appealing is, or has been, an officer or director of the General Paper Company and all, except Stuart, are or have been officers, directors and stockholders in one or more of the other corporation defendants.

The complaint, after charging that all the defendants have violated the statute by entering into and acting under the unlawful combination, contracts and agreements alleged, prays amongst other things, "that the defendants and each and every one of them, and their *officers, directors, stockholders, agents and servants, and each and every one of them*, be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out the same," etc. No doubt the injunction prayed for, if granted against the corporations, would be legally binding upon the officers and directors, even if it were not directed against them specifically; but it is significant that the prayer of the complaint seeks to make the appealing witnesses, in terms subject to the penalty of injunction prescribed by the act. If, as we contend, the liability to injunction imposed by the statute, is itself a penalty, it being one of the express purposes of the suit to subject the appealing witnesses by the decree which is sought to that penalty, they are within the very terms of protection afforded by the fifth amendment. It is doubtless sufficient to excuse them from testifying, that the suit in which they are called upon to testify in terms seeks to subject them to the penalties of the relief which is asked; but if the enquiry be material, whether they would be prejudiced

by the decree in fact, we think it must be conceded that the denial to them, as directors and managing officers of defendant companies of the right to carry out existing contracts and continue in established relations conceived to be for the interest of their companies and generally to continue in their offices without restraint, is a legal detriment to them as well as to the company. It may be said that it is no legal detriment to a party to enjoin him from proceeding under an illegal contract or business relation, but this would be begging the question. The illegality of the contracts and relations in question cannot be assumed at this stage of the case. That is the point at issue. The officers and directors have the right to manage and conduct their business, free from restraint, so long as they are guilty of no violation of law. The question is, can they be compelled to testify for the purpose of proving that they are violating the law, and consequently, liable to restraint? No one has a legal right to commit a crime; but everyone has a legal right to refuse to furnish evidence to prove that the course of conduct in which he is engaged is criminal, at least unless he is completely indemnified against the consequences.

Brown vs. Walker, 161 U. S. 591.

D.

The consequences which must result to the appellants from the passing of the decree prayed for in the complaint are in the nature of a forfeiture. They should not be required to furnish the evidence to subject them to such forfeiture.

Each of the appellant witnesses is a stockholder in the General Paper Company. It appears, it is true, that they hold this stock in trust for the different defendant corporations in which they are interested; but the legal title to the stock is nevertheless in the witnesses. Aside from this, each of them, except W. Z. Stuart, is the owner of a substantial stock interest in one or more of the other defendant companies. Alexander is the owner $60,000 of stock in the defendant John Edwards Manufacturing Company, $40,000 in the Nekoosa Paper Company and $25,000 in the Centralia Pulp & Water Power Company. Whiting is the owner of $100,000 of stock in the Wisconsin River Paper & Pulp Company. Harmon is the owner of $16,000 of stock in the Centralia Pulp & Water Power Company.

It is alleged in the moving petition upon which the order to show cause was based, amongst other things, that the defendants:

"did in or about the year 1900, in the manner and form mentioned in said petition" (referring to the petition in the suit) "enter into an agreement, combination and conspiracy with each other to restrain the trade and commerce with the several states and control and monopolize said trade and commerce, in this: that the said defendants, save and excepting the General Paper Company, combined and conspired together to restrain and eliminate competition among themselves by and through the organization of a selling agent known as the General Paper Company, another party defendant, which General Paper Company was by various contracts and agreements thereupon made with the said other defendants given full power and control over the product and the disposition thereof of the defendants so contracting with it."

The allegations of the petition are to the effect that the entire business of the General Paper Company rests upon its contract relations with the other defendants, and that the entire business of each of the other defendant companies in the matter of disposing of its product is done through the General Paper Company under contract relations with it, all of which it is the express object and purpose of the suit to establish as illegal because in violation of the statute; and it prays that the General Paper Company be enjoined from acting as sales agent of the other defendants.

The answers of the appellants to the order to show cause in the court below, while denying the unlawful character of said contracts, allege:

"That said contracts and agreements are of great value to said General Paper Company and upon them rests practically its entire business, and that the same are also of great value to and constitute valuable property rights in each of the defendants respectively parties thereto, including the defendant hereinabove named" (the defendants in which the answering witnesses severally own stock).

The answers further allege, by appropriate allegations, that an injunction from carrying out said contracts and agreements such as is prayed for in the complaint, and their virtual annulment thereby occasioned, would result in great injury, damage and loss to the General Paper Company and to the other defendants, parties to such contracts and agreements, including the defendants in which the witnesses respectively are stock-

holders, and to them personally as stockholders in such defendants.

They further allege that to require the appellants to furnish evidence in support of the allegations of the complaint, would be to subject the General Paper Company and the other defendants in which they are respectively interested as officers, directors and stockholders, to forfeiture of their charters under the laws of the State of Wisconsin, and to consequent loss and damage to the corporations and to themselves, including the practical forfeiture of their stock in such corporations.

Further, that the contracts made by the defendant corporations in which the witnesses are severally interested as officers, directors and stockholders, through the General Paper Company as their sales agent, under and pursuant to its agency contracts, which are sought to be declared illegal in said suit, are of great value; that there are a large number of such contracts outstanding under which large sums of money are due to said defendant corporations in which they are interested as officers, directors and stockholders as aforesaid, exceeding in each case the sum of $10,000, all of which may be uncollectible, forfeited and lost in case the illegal combination alleged in the bill of complaint should be established.

For the purpose of determining the privilege of the witnesses to decline to answer, all of these allegations of fact must of course be taken as true. In fact, they are all undisputed. In view of these allegations it is evident, if indeed it is not apparent from the nature of the suit and the allegations of the complaint, that the establishment of the complainant's case by the decree prayed for must result in the paralysis and consequent destruction of practically the entire business of the defendants as it is now being carried on. The General Paper Company is to be enjoined from continuing to act as sales agent for the other defendants and the latter are to be enjoined from continuing the General Paper Company as their sales agent. The several contracts under which the General Paper Company has been acting as sales agent for the different defendants and under which their business has been transacted for more than four years are to be declared illegal; in other words, the entire foundation of the business of the General Paper Company and of other defendants so far as it depends upon that of the General Paper Company.

In the American & English Encyclopedia of Law, Vol. 13, p. 54, a forfeiture is defined as "A loss of one's rights and interest in his property." In the note it is stated "A fine is a pecuniary penalty and is commonly (perhaps always) to be collected by

suit of some kind. A forfeiture is a penalty by which one loses his rights and his interests in his property," citing Gosselink vs. Campbell, 4 Iowa, 300; Indianapolis vs. Fairchild, 1 Ind., 318; Fain vs. United States, 1 Wyoming, 247. One of the definitions given by the Century Dictionary is, "Specifically in law, the divesting of property, or the termination or failure of a right by or in consequence of a wrong, default, or breach of a condition."

To enjoin the carrying out of the contracts existing between the General Paper Company and the other defendants respectively, not for the redress of any private grievance or for the protection of any private right, but solely on the ground of public policy, is in effect a forfeiture of those contracts. It is as much a forfeiture as would be the seizure and deprivation by the government of tangible property deemed inimical to the public good, as for example machinery designed for counterfeiting, or of goods seized for violations of the customs and internal revenue laws.

So also the deprivation on the ground of public policy of the right of the defendant companies, their officers and directors, to continue to carry on their business as already established and in accordance with their wishes, is a forfeiture not only of propert but of personal liberty. The forfeiture of property, by the annulment of contracts and deprivation of the fruits of existing contracts and business relations, is evident. The forfeiture of personal liberty is equally obvious.

The liberty of contracting is both a liberty and a property right, of which one cannot be properly deprived without due process of law.

Ritchie vs. The People, 155 Ill., 98.

The liberty guaranteed by the Constitution includes the right to freely buy and sell, make contracts and have them enforced, as others may.

State vs. Loomis, 115 Mo., 307.

Liberty, as understood in this country, includes also the right of a person to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade and occupation.

In Matter of Jacobs, 98 N. Y., 98.

It may be said that any suit for an injunction to prevent the execution of a contract, or a party's freedom of action in any threatened course of conduct would involve the same question, but this, we submit, is not true. The distinction is between a suit by a private party to enforce a private right or to redress a private wrong, and a suit at the instance of the government to restrain the freedom of action of particular parties on the

ground of public policy for the public welfare. The first relates merely to an adjudication of private right between private parties, as between whom the state stands as an impartial arbiter; the second is the exercise of governmental power to impose restraints upon the liberties of private parties in the interest of public policy. *In such case, whatever may be the form of the proceeding, every reason for which the limitations upon the inquisitorial powers of government were designed is present.* This seems perfectly obvious.

The power of Congress to interfere with and restrain the ordinary freedom of contract in the exercise of its legitimate powers is not attacked by this argument. What we do claim is that in a suit by the United States, as complainant, which contemplates as its object a restraint upon the liberties of particular citizens or the imposition of any penalty or forfeiture, the parties to be affected should not be required to furnish the evidence against themselves to justify the restraint, penalty or forfeiture which it is the object of the suit to impose.

To say that the business of defendants and of the witnesses, as stockholders and officers, is unlawful, and that they have therefore no right to continue in it, does not answer this objection; for before their right to carry on their business can be denied, or forfeited, it must be shown that it is unlawful. This the government is at liberty to do in any way it can, subject to the restrictions in favor of personal liberty. But to compel the defendants or the appellant witnesses to furnish the necessary proof is to compel them to furnish the evidence which may subject them to a penalty or forfeiture.

In the same way no man has a right to import dutiable goods without paying duties; or to distill spirits or brew malt liquors without paying the internal revenue taxes; or to have in his possession tools or materials for purposes of counterfeiting or safe-breaking, or to maintain a public nuisance. But he cannot be compelled himself to furnish the evidence which will sustain a forfeiture of goods, or distilleries, or tools, or other property. His possession and use of all of these must be shown to be criminal, and by other testimony than his own, before his right to possess or use his own property as he pleases and in his own way can be taken from him by authority of law.

E.

The witnesses were entitled to decline to answer not only on the ground of personal privilege, but also on the ground that their answers would be the answers of the General Paper Company and the other defendants whose officers and directors they were, and might tend to subject said defendants to fines, penalties and forfeitures and to loss or damage in the nature of a forfeiture.

The moving petition shows that the appellant witnesses were called as officers and directors of the General Paper Company. Thus, it is alleged:

> "That the first witness called for examination by counsel for the petitioner was L. M. Alexander, secretary and treasurer of the General Paper Company, president of the defendant, The John Edwards Manufacturing Company, secretary and treasurer of the defendant, The Nekoosa Paper Company, and secretary of the defendant, Centralia Pulp & Water Power Company. That the second witness called for examination by counsel for the petitioner was George A. Whiting, first vice-president of the defendant, General Paper Company, and president of the defendant, Wisconsin River Paper & Pulp Company. That the third witness called for examination by counsel for the petitioner was W. Z. Stuart, second vice-president of the General Paper Company."

The answers are all to the effect that such knowledge as the witnesses have of the affairs of defendants came to them in their capacity as officers, in the performance of their duties as such.

The General Paper Company was permitted to intervene in the proceedings against their officers, the appealing witnesses, and to join with them in their objections to answering the questions.

A corporation can speak and act only through its proper officers and agents, within the scope of their respective duties. If the officers of a corporation can be compelled to testify against the corporation in a matter involving the forfeiture of the charter, property and business of the corporation, then corporations are entitled to no protection either under the Constitution or the common law against self-crimination or inquisitorial proceedings to forfeit their property.

In Covington Turnpike Co. vs. Sanford, 164 U. S., 578, at page 592, this court said:

"It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws. Santa Clara County vs. Southern Pacific Railway Co., 118 U. S., 394; Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181, 189; Minneapolis & St. Louis Railway vs. Beckwith, 129 U. S., 26; Charlotte, &c., Railroad vs. Gibbes, 142 U. S., 386, 391."

The equal protection of the laws, it would seem, must include the right to be protected from self-incrimination through inquisitorial proceedings against the officers and directors, through whom the corporation must act and who are to all legal intents and purposes the *alter ego* of the corporation.

In Louisville, &c., Railway Co. vs. Louisville Trust Co., 174 U. S., 552, at page 573, this court said:

"A corporation, though legally considered a person, must perform its corporate duties through natural persons and is impersonated in and represented by its principal officers, the president and directors, who are not merely its agents, but are, generally speaking, the representatives of the corporation in its dealings with others."

There seems to be a singular dearth of cases directly in point, but such as we have been able to find bearing upon the question are to the effect that an officer cannot be compelled to testify to matters tending to subject his company to a penalty or forfeiture.

State vs. Simmons Hardware Co. (Mo.) 15 L. R. A., 676.
Davis vs. Lincoln National Bank, 4 N. Y. Sup., 373.
Bank of Oldtown vs. Houlton, 21 Me., 502.

That the answers, if material to the case of the government, would tend to subject the defendant companies to penalty and forfeitures has been sufficiently indicated in the previous argument.

It may be contended that if the witnesses speak for the corporations which they represent, in so far as their answers may tend to subject either them or their companies to penalties or forfeitures within the meaning of those terms as used in the fifth amendment, both the witnesses personally and the corporations which they represent are relieved from such liability by the immunity clause of the act of Congress which purports to relieve the witness or party furnishing the testimony from lia-

bility to penalties or forfeitures concerning the transactions, matters or things to which the testimony relates. This contention, we submit, is fully met by the argument here presented to the effect that the immunity clause is not applicable and can not extend to relieve either the witnesses or the corporations from certain phases of the liability to penalties or forfeitures, to which any answers material to the case of the government would tend to subject them.

IV.

QUESTIONS OF PRACTICE.

(1) Appealability of Orders.

The act of March 3, 1891, creating the circuit courts of appeals and defining and regulating the jurisdiction of the courts of the United States, contains the following sections:

"Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

"From the final sentences and decrees in prize causes.

"In cases of conviction of a capital crime.

"In any case that involves the construction or application of the Constitution of the United States.

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

"Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

"Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or writ of error final decision in the district court and the existing circuit courts in all cases other than those pro-

vided for in the preceding section of this act, unless otherwise provided by law."

1 Comp. Stats. 1901, pp. 549, 550.

The act of February 11, 1903, to expedite the hearing and determination of suits in equity under the anti-trust act of 1890 and the Interstate Commerce Act of 1887, provides:

"Sec. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said acts wherein the United States is complainant, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

Comp. Stats. 1901, Supp't for 1903, p. 376.

In appealing from the order of the circuit court we have followed the practice indicated in the two cases of Interstate Commerce Commission vs. Brimson, 154 U. S., 447, and Interstate Commerce Commission vs. Baird, 194 U. S., 25. In these cases the Interstate Commerce Commission appealed to this court from orders of the circuit court denying its application for an order to compel witnesses to answer questions and produce books and papers upon an investigation conducted by the Commission under the Interstate Commerce Act. In each case it was held that the application by the Interstate Commerce Commission made a "case" and that the order denying the application was a final order and therefore appealable.

The two cases cited differ from the present ones only in this: that no action was there pending in any circuit court to which the proceedings to compel the testimony of witnesses and the production of books and papers could be said to be ancillary. Otherwise, however, the proceeding itself was in every substantial respect the same as that adopted in the present cases. There were similar pleadings, by petition and answer, appearances of counsel, evidence, hearings, and orders based upon all of these. And the decision of this court—that any order made by the circuit court upon applications under Section 12 of the Interstate Commerce Act, whether such order denied the petition of the Interstate Commerce Commission or required the witnesses to appear and answer questions and produce books and papers, would be a final order conclusive of the rights of the parties and therefore reviewable by the Supreme Court on appeal—seems to be entirely applicable to the present cases.

In the opinions the following statements are made:

"The proceeding is one for determining rights arising out

of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered that will be conclusive upon the parties until reversed by this court. * * *

"We are of opinion that a judgment of the circuit court of the United States determining the issues presented by the petition of the Interstate Commerce Commission and by the answers of appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. And a final order by that court dismissing the petition of the Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process."

Interstate Com. Com. vs. Brimson, 154 U. S., 487, 489.

"This court has held that a petition filed under Section 12 of the Interstate Commerce Act (U. S. Comp. Stat. 1901, p. 3162) against a witness duly summoned to testify before the Commission, to compel him to testify or to produce books, documents, and papers relating to the matter in controversy, makes a case or controversy to which the judicial power of the United States extends, Interstate Commerce Commission vs. Brimson, 154 U. S., 447. * * * The present proceeding is not merely advisory to the Commission, but, as was said in Interstate Commerce Commission vs. Brimson, 154 U. S. 447, a judgment rendered will be a final and indisputable basis of action as between the Commission and the defendant, and furnish a precedent for similar cases. While it has for its object the obtaining of testimony in aid of proceedings before the Commission, it is evident that important questions may be involved touching the power of the Commission and the constitutional rights and privileges of citizens. Congress deemed it imperative that such cases, affecting the commerce of the country as well as personal rights, should be promptly determined in a court of last resort."

Interstate Commerce Com. vs. Baird, 194 U. S., 38, 39.

Appellate jurisdiction under the act of 1891 is conferred in "cases" where the proper subject for review arises. The question: What is a case? is considered in the opinions just quoted, in the Baird and Brimson cases. In the latter reference is made to Osborn vs. Bank of the United States, 9 Wheat., 738, 819, where Chief Justice Marshall, referring to the clause in the fed-

eral constitution which extends the judicial power "to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority," says:

"This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

In Little York Gold Washing & Water Co. vs. Keyes, 96 U. S., 199, Mr. Chief Justice Waite in his opinion used the following language:

"The attempt to transfer this cause was made under that part of Section 2 of the Act of 1875 which provides for the removal of suits 'arising under the constitution or laws of the United States.' In the language of Chief Justice Marshall, a case 'may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends upon the construction of either' (Cohens vs. Virginia, 6 Wheat., 379); or when 'the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, or sustained by the opposite construction' (Osborn vs. Bank, 9 Wheat., 822)."

And in a case in the circuit court of appeals it is said:

"The Supreme Court has not placed upon the words 'final decree,' respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction."

Eau Claire vs. Payson, 107 Fed. Rep., 552, 557.

The objection—if such an objection could be made—that these proceedings are merely incidental to a suit in equity pending in the circuit court of the Minnesota district, in another circuit, might be fully met by the acknowledged rule that there may be more than one final order and more than one appeal in the same suit.

Trustees vs. Greenough, 105 U. S., 527.

Tuttle vs. Claflin (C. C. A.), 88 Fed. Rep., 122.

Eau Claire vs. Payson (C. C. A.), 107 Fed. Rep., 552, 557.
Rouse vs. Letcher, 156 U. S., 47, 50.

(2) Rule as to Ancillary Proceedings Applies.

But these proceedings are not properly incidental, but collateral, having a distinct and independent character. They belong to the class known as ancillary, in which the form is determined by the circumstances of each case. So far as the question of appealability goes, they are subject to the same rules as original and independent actions. This is clearly proved by the numerous cases defining the nature of ancillary proceedings, and those in which appeals and writs of error have been entertained in such proceedings. A few only of these need be cited.

Krippendorf vs. Hyde, 110 U. S., 276, 280, 287.
Freeman vs. Howe, 24 How., 450, 460.
Christmas vs. Russell, 14 Wall., 69, 80.
Rouse vs. Letcher, 156 U. S., 47, 50.
Stewart vs. Dunham, 115 U. S., 61, 64.
Carey vs. Houston, etc., Ry. Co., 161 U. S., 115, 126, 127.
Pope vs. Louisville, etc., Ry. Co., 173 U. S., 573.

The present proceedings have all the distinguishing characteristics of any suit in equity or action at law. They have their own parties—who are not the same as in the suit of which they are said to be incidents—appearing by their own counsel; they have their own pleadings and their own issues, upon which evidence was taken and hearings had; the orders appealed from contain all the relief which was asked for and are final and conclusive upon all the questions involved in the controversy before the lower court and upon all the rights of parties which were at stake in that controversy; and, what is the conclusive test, nothing remains to be done by the lower court, if its order should be sustained, except to enforce it.

For the test of finality as to any particular order, under the decisions of this court, is this: That an order, to be appealable, or final for the purposes of appeal, must be conclusive upon the merits and must leave the matter in controversy in such a condition that if there be an affirmance here the court will have nothing to do but to execute the order it has already entered.

Bostwick vs. Brinkerhoff, 106 U. S., 3.
St. L. &c. R. Co. vs. South. Expr. Co., 108 U. S., 24.
Winthrop I. Co. vs. Meeker, 109 U. S., 180.

Mower vs. Fletcher, 114 U. S., 127.
Trustees vs. Greenough, 105 U. S., 527, 531.

(3) Proceedings Civil, Not Criminal.

The same objection has been made in a somewhat different form in this way: that no rights can be said to have been finally determined until there has been an adjudication in contempt; and it is said that the proceedings in the circuit court were simply preliminary to proceedings for an adjudication in contempt.

To this it seems a sufficient answer to say that the orders appealed from did finally determine the rights of the parties to the proceedings; rights of great importance to them and depending for their validity upon the construction of the Constitution of the United States. There are many other final orders a violation of which may result in punishment for contempt. That is true of all final decrees mandatory or injunctional in their nature; but it never has been held in such cases that an injunctional decree is not final because it may be disobeyed, or that there is no right of review until there has been a disobedience and a punishment for contempt.

That the proceeding in the court below was a civil proceeding is apparent from the fact that appeals were entertained in similar proceedings in the Baird and Brimson cases, and from the fact that the suit to which they are ancillary is a civil proceeding. If the order made by the court below is not a final order, and if no other order therein can be considered a final order prior to an adjudication and punishment for contempt, then the proceeding is in its nature wholly unique. There is no other civil proceeding where it is necessary in order to obtain a right of review of a final order that the party against whom the order runs must do something which will subject him to criminal punishment.

(4) Right of Appeal to the Supreme Court.

In the Brimson and Baird cases already cited the words "final decree" in the act of February 11, 1903, were held to include the orders appealed from by the Interstate Commerce Commission. That, however, was under a special proviso contained in the act of February 19, 1903, U. S. Comp. Stat. 1901, Supplement of 1903, p. 365, extending to proceedings before the Inter-

state Commerce Commission the provisions of the act of February 11, 1903.

Those cases may here be considered in point in which it has been held that the final order or decree in ancillary proceedings is governed by the same rules, in respect of appeals to the Supreme Court, as the decree in the principal suit.

Pope vs. Louisville, Etc., Ry. Co., 173 U. S., 573.
Carey vs. Houston, Etc., Ry. Co., 161 U. S., 115.
Rouse vs. Letcher, 156 U. S., 47.

In view of the provisions and requirements of the act of February 11, 1903, these appeals were perfected and the record returned to this court within sixty days—in fact, within thirty days—from the dates of the orders appealed from.

If, however, there is any question whether the act of February 11, 1903, applies to appeals in such cases as the present, there can be no doubt of the right of appellants to obtain a review of the orders appealed from by direct appeal to the Supreme Court under the provisions of Section 5 of the act of March 3, 1891.

Loeb vs. Township Trustees, 179 U. S., 472.
W. U. Tel. Co. vs. A. A. R. R. Co., 178 U. S., 239.
Penn. Mut. L. Ins. Co. vs. Austin, 168 U. S., 685.

The appellants in their answers fully and clearly set out the grounds upon which their right of appeal under the act of March 3, 1891, must rest, planting themselves squarely upon the protection of the federal Constitution and bringing themselves within the rulings of this court contained in the three cases last cited.

(5) Appeal of General Paper Company.

The General Paper Company is a defendant in the principal suit pending in the circuit court of the district of Minnesota. The other appellants here were subpoenaed as officers of the General Paper Company and the questions which they were asked and refused to answer and the books and papers which they were required and refused to produce upon the hearing before the examiner all related to the business of the General Paper Company. Whether those questions are to be answered and whether those books and papers are to be produced is a matter as nearly affecting the interests of the General Paper Company as those of the other appellants. It may be true that the other appellants could obtain a review of the legality of the order made by the court below by taking a writ of error to a

subsequent order adjudging them in contempt in case of disobedience; but from such other order, purely criminal and personal in its nature, the General Paper Company could not take an appeal. If it is to be heard upon the question of its rights it must be heard upon its appeal from the order already entered. It was permitted to become a party to the proceedings below; as a party it filed an answer in those proceedings; and as a party it appeals from the orders made in them.

As bearing upon the propriety of its intervention we refer to the cases which hold that a person not an original party to a suit, such as a bondholder or stockholder in a corporation-mortgagor or a purchaser at a foreclosure sale, may intervene for the sake of protecting his interests and may appeal from a decree which affects them.

Williams vs. Morgan, 111 U. S. 684, 698, 699.
Richardson vs. Green, 133 U. S. 30.
Kneeland vs. American Loan Co., 136 U. S. 89.
Davis vs. Mercantile Trust Co., 152 U. S. 590, 593.
Central Trust Co. vs. Cal. & N. R. R. Co., 110 Fed. Rep. 70.

(6) Upon These Appeals Not Only the Constitutional Questions But all Other Questions Raised by the Assignments of Error Can Be Determined by this Court.

Horner vs. United States, 143 U. S. 570, 577.
Chappell vs. United States, 160 U. S. 499, 509.
Penn Mut. L. Ins. Co. vs. Austin, 168 U. S. 685, 695.
Loeb vs. Township Trustees, 179 U. S. 472, 481.
Davis & Farnum Mfg. Co. vs. Los Angeles, 189 U. S. 207, 216.
Field vs. Barber Asphalt Co., 194 U. S. 618, 620.

(7) Assignments and Specifications of Error.

The specifications of error are copies of the assignments of error. They point out the particular respects in which the orders appealed from are claimed to be erroneous, without going into the reasons for such claim, and they refer to the pages of the record where the alleged errors appear.

Supreme Court Rules XXI, XXXV.
Vider vs. O'Brien, 62 Fed. Rep. 326.
Lincoln Sav. Bank & S. D. Co. vs. Allen, 82 Fed. Rep. 148.
Hoge vs. Magnes, 85 Fed. Rep. 355.

Nat'l Cash Reg. Co. vs. Leland, 94 Fed. Rep. 502.
A. T. & S. F. R. Co. vs. Mulligan, 67 Fed. Rep. 569.
McFarlane vs. Golling, 76 Fed. Rep. 23.
Andrews vs. Nat'l Foundry & Pipe Works, 76 Fed. Rep. 166.
A. T. & S. F. R. Co. vs. Meyers, 76 Fed. Rep., 443.

For these reasons the appellants ask that the orders appealed from may be reversed.

Respectfully submitted,

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